CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~389~~. 314

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED AUGUST 5, 1895.

(15,979.)

(15,979.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 689.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of judges	1	1
Statement of facts	1	1
Questions certified	16	16
Clerk's certificate	18	16
Opinion of Judge Taft	19	17
Opinion of Judge Lurton	54	50

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1896.

1 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1892.

JAMES COMPTON, Appellant, *vs.* JAMES R. JESUP and EDWARD H. DIXON, Trustees, *et al.*, Appellees.	No. 84. Appeal from the Circuit Court of the United States for the Northern District of Ohio, Western Division.

(April 2, 1895.)

Before Taft and Lurton, circuit judges, and Ricks, district judge.

This is an appeal from that part of a decree in a railroad mortgage foreclosure suit, rendered by the circuit court of the United States for the northern district of Ohio, which fixes the priority of a lien of the appellant and prescribes the remedy for its enforcement. James Compton the appellant was a citizen of the District of Columbia. Holding equipment bonds issued by the Toledo and Wabash Railway Company, which subsequently became one of the constituent companies of the Wabash system, he obtained a decree from the Ohio supreme court, declaring them to be a valid lien on that part of the main line of the Wabash system reaching from Toledo west to the Illinois line, and awarding to him, as a means of enforcing the lien, an order for sale of the portion of the line lying in Ohio. Shortly after the entry of this decree by the Ohio supreme court and before it was executed, upon the prayer of the complainant and a cross-complainant in the foreclosure proceeding in the court below and after the filing of the necessary affidavit, the court entered an order based on section 8 of the act of Congress of March 3rd, 1875, directing that Compton be served with subpœna in the District of Columbia and required to appear and set up his lien in this cause. The order was complied with and Compton, appearing only for the purpose of objecting to the validity of the service, moved the court to set the service aside and to dismiss him from the case. The motion was overruled. He then demurred to the jurisdiction on the ground that citizens of the same State appeared on both sides of the controversy. His demurrer was overruled. The amendments to the bill and cross-bills concerning Compton denied the validity of his lien and asserted that he was

2 estopped by matter of record to claim a lien because of a decree of the Supreme Court of the United States to which he was in law privy, in the case of Wabash, St. Louis & Pacific Railway Company *vs.* Ham, denying the existence of a lien in favor of the equipment bondholders. Compton in his answers which he filed after his demurrer was overruled set up his lien as declared by the Ohio supreme court decree and his right thereunder to have the Ohio division sold to satisfy it. Compton also claimed in his answer that his bonds were a first lien upon certain terminals of the defendant company at Toledo on the ground that the Ohio di-

visional mortgage did not cover this property. The court below adjudged that Compton had a valid lien on the Ohio and Indiana lines by virtue of the Ohio decree, but denied his right to a first lien on the Toledo terminals or to a separate sale of the Ohio line, and declined to afford him any relief but that of redeeming the four divisional mortgages, two on the Ohio line and two on the Indiana line, by the payment of about $8,000,000.00. The sale under the decrees of foreclosure in the court below, against Compton's objection took place before the validity and character of his lien were determined, and a provision was inserted in the decree saving his rights. Compton contended that the language of this saving clause entitled him to the payment of his lien by the purchaser or in default thereof a resale of the Ohio part of the railroad. At the hearing of the appeal, a motion was made to dismiss on the ground that the same decree as that here appealed from was entered by the U. S. circuit court for Indiana in a case between the same parties.

This appeal presents the questions:

1st. Had the court jurisdiction of the original bill?

2nd. Had it power to make Compton party by substituted service?

3rd. Was Compton estopped to assert a lien for his bonds by a decree of the U. S. circuit court for Indiana denying it for bonds of the same kind in what was claimed to be a representative suit?

4th. Did the Ohio divisional mortgages not cover certain after-acquired terminal property at Toledo so that Compton had a first lien thereon?

5th. What was the effect of the proviso in the decree of sale upon Compton's rights and remedy?

6th. What relief was he entitled to, under the Ohio decree?

7th. Is Compton estopped to prosecute this appeal by the fact that a decree identical in terms with the one here appealed from was entered in the U. S. circuit court for Indiana, and has not been appealed from?

The facts of the case are quite complicated and many of them must be stated for a clear understanding of the issues.

3 The Wabash, St. Louis & Pacific Railway Company, usually known as the Wabash system, comprised as its main line, a railroad which ran from Toledo, Ohio, west through Ohio, Indiana, Illinois, and Missouri to Kansas City. It was the result of a consolidation of separate railroads, one in Ohio, one in Indiana, three or four in Illinois and one or more in Missouri. First the Ohio and Indiana companies were consolidated, then the companies east of the Mississippi river, and finally in 1880, all of them were united in the Wabash, St. Louis & Pacific Company. Many of the constituent companies had issued bonds secured by mortgage upon their respective lines, and as consolidations took place, the new companies assumed the obligation of the mortgage and bonded debts of their constituents. When the Ohio and Indiana companies were united in 1858 under the name of the Toledo and Wabash Railway Company, there were two mortgages on the Ohio part, one to the

Farmers' Loan and Trust Company trustee to secure $900,000 of bonds and a second to E. D. Morgan, trustee to secure bonds amounting to $1,000,000.00. There were also two mortgages on the Indiana part, one to the Farmers' Loan & Trust Company trustees for $2,500,000.00 and a second to E. D. Morgan, trustee for $1,500,000. The Toledo and Wabash Company in 1862 issued equipment bonds to the amount of $600,000.00, but gave no mortgage to secure them. It is $150,000.00—par value—of the equipment bonds which is the subject-matter of this appeal. In 1865 the Toledo & Wabash Railway Company united with several Illinois companies and became the Toledo, Wabash and Western Company with a line reaching from Toledo to the Mississippi river. It was this consolidation which the supreme court of Ohio held, by virtue of the Ohio statute authorizing it to have the effect of fastening the equipment bonds as a lien on the property of the Toledo & Wabash Railway Company which passed to the new company. The articles of agreement contained the following provisions:

"Now, therefore, the said companies by their respective directors agree to consolidate their said roads, property and capital stock into one company upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads, to the stockholders thereof for ratification, to wit:

"The Toledo and Wabash Railway Company enters into said consolidation on the following basis, viz:

"Its capital is	$10,000,000

"Composed as follows:

"First-mortgage bonds	$3,400,000
"Second-mortgage bonds	2,500,000
"Convertible equipment bonds	600,000
"Convertible preferred stock	1,000,000
"Common stock	2,500,000

* * * * * * *

"It is further agreed that, on the terms and condition above specified, the four railroad companies hereto, do agree each for itself severally, that the several companies named shall be and they hereby are consolidated into and form one corporation, etc.

* * * * * * *

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement shall, as to the principal and interest thereof, as the *cause* shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced." (Record, p. 324.)

The new company the Toledo, Wabash & Western Railway Company shortly after the consolidation offered a mortgage to Knox & Jesup trustees upon its entire road, known as the consolidated mortgage, with the purpose therein recited of using the proceeds of their

sale to take up and refund all previous indebtedness including the equipment bonds. The purpose was never carried out, but some $2,500,000.00 of bonds were issued and the proceeds expended for the use of the company. In the foreclosure of a subsequent mortgage called the gold-bond mortgage, and the consequent reorganization, the property of the Toledo, Wabash & Western Company passed, subject to all previous mortgages, to a consolidated company of the same three States called the Wabash Railway Company, which issued bonds amounting to $2,000,000 secured by mortgage on its line to Humphreys and Lindley, trustees. In the decree for sale and deeds under it it was provided that the sale should be without prejudice to the equipment bondholders' rights which were left open. Then the Wabash Company united with a Missouri company to make the Wabash, St. Louis, & Pacific Company a consolidated company of Ohio, Indiana, Illinois and Missouri, with a line of railway extending from Toledo to Kansas City. This company issued bonds amounting to $17,000 and secured them by mortgage on its entire line to the Central Trust Company and James Cheney of Indiana as trustees. In 1884 the Wabash, St. Louis & Pacific Railway Company filed a bill in circuit court for the eastern district of Missouri against the Central Trust Company, a citizen of New York and James Cheney, a citizen of Indiana, trustee under the last mortgage, averring its insolvency, praying for the appointment of a receiver, the marshalling of liens upon it, the sale of its road and a distribution of proceeds for the benefit of its creditors. A similar bill was filed in the circuit courts for the northern district of Ohio and for other districts. Receivers were appointed, who took possession of the railroad, and operated it. Shortly afterward the Central Trust Company and Cheney filed a bill to foreclose their mortgage in State courts of the several States where the mortgaged property lay. These suits were removed to the proper Federal courts, and were consolidated with the insolvency bills (so called) already referred to. The consolidated causes proceeded to decrees for sale in the various jurisdictions. The property was bid off in each court to James F. Joy and others, a purchasing committee under a plan of reorganization entered into by the foreclosing bondholders. The sales were confirmed and deeds ordered to be executed. The committee took possession from the receivers of the part of the railroad west of the Mississippi river but for some reason, not clearly disclosed in the record, the court did not order the receivers to deliver possession to the purchasers of the lines east of the Mississippi. The sale of Joy and associates in Ohio was subject to the Humphreys & Lindley mortgage, the Knox & Jesup mortgage, the Compton lien if any he had and the Ohio divisional mortgages. While the railroad in Illinois, Indiana and Ohio was still in the hands of the receivers, Knox & Jesup began the proceeding in which this appeal was taken, by filing bill against the Wabash, St. Louis & Pacific Railway Company to foreclose their mortgage in the circuit courts of northern Ohio, Indiana and Illinois and for the appointment of *a* receivers and made parties defendant those holding mortgages on the part of the road within

each jurisdiction as well as the purchasing committee at the former sale. Humphreys & Lindley, and the Farmers' Loan & Trust Company filed answers which, by stipulation were taken as cross-bills setting up their mortgage liens on the Ohio property, and praying a foreclosure and sale. The bills and cross-bills all averred that at the time of filing the same the road was in the possession of the receivers appointed by the court below in the previous foreclosure suit. Citizens of the same State appeared on both sides of the controversy thus presented. Compton was made a party in the way already stated both to the Indiana and Ohio bills and cross-bills. The litigation in the courts of the three States proceeded together. Judge Jackson, the circuit judge for the sixth circuit, and Judge Gresham, the circuit judge for the seventh circuit, sat together, heard the points in dispute argued, and made the same orders in their respective jurisdictions. The pleadings in the court below are quite confusing, and do not seem to have been prepared or filed with much care to keep separate the jurisdictions of the circuit courts of the three districts in which the litigation was pending. The amended bill of Knox & Jesup recited that a similar bill had been filed in the southern district of Illinois and attached the same as an exhibit. Both bills made parties all persons having or claiming an interest in any part of the line in the three States. Among these defendants was Jas. F. Joy, as substituted trustee under the second Ohio divisional mortgage, and also as substituted trustee under the second Indiana divisional mortgage. The cross-bill of Humphreys and Lindley trustees under the mortgage issued by the Wabash Railway Company on the entire line east of the Mississippi river made the same parties as in the amended bill. The amended cross-bill of the Farmers' Loan & Trust Company seeking to foreclose that part of the railroad lying in Ohio only made parties defendant those having a mortgage lien on the Ohio division. Compton was made a party to this cross-bill as was also Jas. F. Joy as trustee under the second mortgage on the Ohio property. By some error Joy as an answer to the amended bill of complaint and the cross-bills of Humphreys and Lindley and of the Farmers' Loan & Trust Company filed the same answer made by him in the Indiana suit, in which he only set up and asked to be protected in his rights as substituted trustee
6 in the mortgage of the Wabash and Western Railway Co. and made no averment or prayer in regard to the mortgage on the Ohio part of the railroad in which he had also been substituted as trustee in place of E. D. Morgan, trustee. Other answers were filed by parties defendants, and the cause proceeded in the three different courts in Ohio, Indiana and Illinois as if the same questions were pending in each court and the same issues were raised, without respect to the territorial jurisdiction of each court. Identically the same decree foreclosing all the mortgages on all the railroad property east of the Mississippi river divisional and otherwise, was entered in each district. The decree was entered March 23rd, 1889. Compton was not required to answer the bill and cross-bills until April following, but in fact did answer March 28, 1889,

so that when the decree for sale was passed, the controversy over his claim was not at issue. This decree, though entered in the circuit court for the northern district of Ohio, purports to foreclose divisional mortgages in Indiana and Illinois and to order to a separate sale property without the territorial jurisdiction of the court, although there is no prayer for such relief, and there is nothing in the decree intended to operate upon the defendant mortgagor company to compel a conveyance of property in another jurisdiction. The decree provided that each division of the road covered by an underlying divisional mortgage should be offered separately, and then the whole road, east of the Mississippi river should be offered as a unit. If the sum offered for the whole road, exceeded the total of the separate bids, the road was to be struck off to the one making the unit bid, and the share of each division in the amount of the unit bid was to be determined in the proportion of the separate bids. The decree provided that no bid should be received on the Ohio bid which did not equal the sum due on both the Ohio divisional mortgages and that no bid should be received on the Indiana division which did not equal the amount due on the first Indiana divisional mortgage. Under this decree, Joy and his associates, the purchasing committee in the previous foreclosure proceedings became the purchasers of the road on their unit bid of $15,500,000. This exceeded by several thousand dollars the sum total of the bids on the separate divisions of the road. The separate bid on the Ohio property amounted to $2,840,595.68, or a little more than enough to pay the principal and interest of the two divisional mortgages. The separate bid on the Indiana division was $3,650,000. This was about $1,300,000 less than would have been required to pay the second divisional mortgage on that division. The purchasing committee organized a new company called the Wabash Railroad Company to which they conveyed the railroad.

The new company was made a party below to contest Compton's lien and his right to a resale or redemption of the Ohio property and is a party to this appeal to oppose the reversal or modification of the decree, claiming to assert the rights of all mortgagees whose interests passed to the purchaser by the foreclosure proceed-
7 ing. Because of the discussion of the effect of the decree for sale on Compton's right, it is necessary to make a somewhat fuller reference to it. After finding the amount due upon each mortgage and foreclosing each mortgage in default of the several payments directed to be made by the mortgagors, the decree ordered a sale at the city of Chicago at which the mortgaged property should first be offered for sale separately, as described in each of the divisional mortgages. It was further provided that there should be deposited with the special master as security for each bid $100,000.00 in cash or in bonds; that after such bids had been made they should be accepted conditionally upon the result of the offer of the entire railway as a unit; that, if the highest bid for the railroad as an entirety exceeded the sum of the highest bids for the separate divisions the entire property should be struck off to the highest bidder for the entire road, that in such case, the court would distribute to

each division its share of the unit bid in proportion to the separate bids received for the separate divisions and that in case of a sale of the property as a unit, the purchaser must deposit in cash or in bonds $900,000 as a pledge that he would comply with his bid. The provision with reference to the payment was as follows:

"There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase-money as the court may direct. The remainder of such purchase price may be paid either in cash, or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the said purchase price were paid by the purchasers in cash, and in all cases in which bonds shall be received by the said special masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon, and in case of the receipt of bonds for security at the time of sale, the said special masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled."

The decree directed that upon the confirmation of the sale by the court and the full payment of the entire purchase price and the compliance by the purchaser with the condition of the sale and orders of the court in that behalf, the special masters should convey the property by good and sufficient deed, to vest in the grantee "all the right, title, estate, interest, property and equity of redemption except as hereby reserved of, in and to all and singular the real estate, property, premises and franchises therein described in fee-simple forever and shall entitle the grantees to the possession thereof."

8 All questions of account between the several different divisions of the railway as to earnings and expenses, as to payments made by the receivers on coupons or bonds secured by the mortgages upon the divisions and all questions of the disposition of the proceeds arising from the sales under the decree were reserved for future settlement and adjustment. The masters were required to pay the proceeds into court to remain subject to the further order of the court. The decree then proceeded:

"All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issue raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection and the defend-

ant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the supreme court of the State of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis & Pacific Railway Company and others, referred to in the pleading herein and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected by said lien or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents with interest thereon at six per cent. per annum from May 1st, 1888, being the amount found due on the equipment bonds by him owned, by the supreme court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and
9 decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton or to prejudice, annul or abridge any right, claim or interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto."

"Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis &

Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and General John McNulta, or upon intervening claims and allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis & Pacific Railway Company or any part thereof, or said receiver or either of them, or the adjustment of any equities arising out of the same between the parties thereto, or their successors either by this court or by the circuit court of the United States for the eastern district of Missouri, or by any United States circuit court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis & Pacific Railway Company, or any part thereof, or by any United States circuit court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis & Pacific Railway Company and others in the circuit court of the United States for the eastern district of Missouri, including the receivers, have been by said circuit court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

"Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers shall not be paid within a reasonable time after being required by order of this or said other courts.

"The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis & Pacific Railway Company or any part thereof, or said receivers, by order of said courts shall be fully paid and discharged.

"The provision aforesaid shall apply to the purchasers of the same under this decree and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation of this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

"The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims if any there are prior in right to the liens of the mortgages upon said

property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist."

The masters reported the making of the sale in accordance with the decree and the sale was confirmed May 18th, 1889. On June 18th an order requiring the masters to execute a deed and to deliver possession was made. This order recited that the purchasers had on deposit a large number of the bonds under all the mortgages, giving the exact amount of each and then proceeded:

"And it further appearing that the said purchasers, by their said petition, offer to deposit at such time and in such amounts as the court may direct, cash sufficient to pay the expenses that the court may require to be paid, and to pay such sum on first-mortgage bonds and funded-debt bonds not deposited in said trust company as the court may direct to be paid in cash, and, as security for such payment, to deposit all or any part of the bonds held by said trust company as the court may direct, and to substitute cash for bonds at such time and in such amounts as the court may require, cash payments and further, to hold the said purchased property subject to be retaken by the court in the event any cash payments directed by the court shall not be made in pursuance of the court's directions.

"The court thereupon, having duly considered the premises, does order, adjudge and decree that the prayer of said petition be granted; that the said purchasers shall forthwith transfer to the said special masters, Bluford Wilson and A. J. Ricks, the bonds deposited with the Central Trust Company of New York and hereinbefore
11 mentioned, to be held and disposed of by said special masters as the court may direct. Notwithstanding such transfers of said bonds to said masters, said purchasing committee shall pay all such sums as may be required from them in carrying out their purchase, and in case of their failure to comply with any orders of the court with respect thereto, the court may retake the property, and all of it conveyed by said deed and annul the title of the purchasing committee with respect thereto and hold the same for further disposition and as security for the rights of the bondholders under the various mortgages foreclosed. Upon such transfer the said special masters shall forthwith make, execute and deliver to said purchasers a deed or deeds, conveying to them or their assigns, all and singular, the railways, premises and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause, and all the right, title, interest and estate of all the parties in said cause, of, in and to the same and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed therefor."

Then followed an order to deliver possession closing with these words: "This order is made subject in all respects to the provisions of said decree of March 23rd, 1889."

On August 17th, 1889, the court ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said

claim and lien and reserved in the former decree herein, saving the rights of said Compton be and the same are hereby referred to Bluford Wilson," etc.

The special master reported that Compton's lien was a valid one and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest in full. The court below sustained the master in holding Compton's lien valid but decided as already stated that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Compton's counsel filed affidavits at the final hearing below to show that their client was deterred from bidding by their advice that the saving clause in the decree made it unnecessary for him thus to protect his claim, because if his lien was held to be valid, the purchaser was required to pay it off, or let the property go to a resale and that but for his reliance on the saving clause, Compton could easily and safely have made a bid high enough to secure the payment of his claim from the proceeds of sale.

The facts on which turned the issue as to whether the divisional mortgages were a first lien on the Toledo terminals, were as follows:

The first Ohio company was the Toledo & Illinois Railroad Company. Its charter of incorporation dated April 20, 1853, provided for building a railroad from the city of Toledo through the counties of Lucas, Henry, Fulton, Defiance and Paulding, or parts of
12 said counties, to the west boundary line of the State of Ohio, in the township of Harrison, in Paulding county. On September 8, 1853, it made a mortgage (known as the first Ohio mortgage) to the Farmers' Loan and Trust Company to secure an issue of bonds amounting to nine hundred thousand dollars. The property covered by that mortgage was described as follows, viz:

"Their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be purchased or paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of the said party of the first part of, in, to or concerning the same." (Printed Record, p. 120.)

The habendum clause is, "To have and to hold the said premises and every part thereof, with the appurtenances unto the same party of the second part."

In June, 1856, the Toledo & Illinois Railroad Company entered into an agreement of consolidation with the Lake Erie, Wabash & St. Louis Railroad Company, and the Toledo, Wabash & Western Railroad Company was thereby formed. That agreement provided that, "All mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as

though the same had been originally executed by such consolidated corporation."

The Toledo, Wabash & Western Railroad Company made a mortgage which was subsequently foreclosed. By the decree of sale the purchaser of the Ohio part, Boody, took subject to the first mortgage. Boody conveyed the Ohio division to a new Ohio corporation, organized with power to construct, maintain and operate a road from Toledo to the Indiana State line, and called the Toledo & Wabash Railroad Company. This company on October 12th, 1858, gave a bond to Edwin D. Morgan trustee for $900,000 and secured it by mortgage of its railroad, made and to be made; all right of way and all land occupied thereby, together with the superstructure, depots, depot grounds and buildings erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessions of the party of the first part, together with all its rolling stock, machinery, furniture and equipments of its said road now and hereafter to be acquired, being the same property described in the deed of Matthew Johnson, marshal and commissioner, to A. Boody, Esq., and dated October 8, 1858, and by A. Boody conveyed to the party of the first part.

The habendum clause was "To have and to hold the premises and every part and parcel thereof, and all its increase, accessions and incidents unto the said Morgan and his successors, etc."

13 The condition of the mortgage and bond was that the Toledo & Wabash Railroad Company would pay the $900,000 of bonds issued by the Toledo & Illinois Railroad Company and secured by the first mortgage. The mortgage recites that it is executed for the benefit of the bondholders under the first mortgage. On October 15th, 1858, the Toledo & Wabash Railroad Company gave a second mortgage to E. D. Morgan trustee for $1,000,000 in which the description of the property conveyed is the same as above, as is also the habendum clause. The true *and* intent and meaning of this mortgage is declared to be as follows:

First. That this mortgage attaches to the property above described as subject to and subordinate to said bonds of the Toledo & Illinois Railroad Company, or said issue of nine hundred thousand dollars whether evidenced by said bond of the party of the first part, made to Edwin D. Morgan, trustee, etc.

Second. That the party of the first part, or any railroad company into which it may become a component part by consolidation, shall be chargeable with said sum of nine hundred thousand dollars, as a prior lien and encumbrance to any other debt thereon.

The Toledo & Wabash Railroad Company of Ohio soon after executing the foregoing mortgages entered into articles of consolidation with the Wabash & Western Railway Company, an Indiana corporation, thereby forming the Toledo & Wabash Railway Company. It was provided in that agreement that all mortgages given by either of the parties "shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

This company took possession of the property and operated it. Later it acquired certain terminal property in Toledo. It issued the equipment bonds. It made no mortgage at any time.

In 1865 the Toledo & Wabash Railway Company and various Illinois companies entered into an agreement of consolidation whereby the Toledo, Wabash & Western Railway Company was formed. It was this agreement which created the lien in favor of the equipment bonds which was adjudicated in Compton's suit.

Another issue raised by the bill and cross-bills and Compton's answers was the effect of a decree of U. S. circuit court of Indiana denying the existence of a lien in favor of equipment bonds of the same issue as those held by Compton, upon the Ohio decree in Compton's favor. It was contended by complainant below that Compton was a party to the Indiana decree and was thereby estopped to plead the Ohio decree. The master and the court below decided in Compton's favor on this point. The facts in respect to this issue were as follows: In 1878, one Tysen brought suit on behalf of himself and such other owners of equipment bonds of this issue as might desire to come into said suit and contribute to the ex-
14 pense thereof, to establish that the bonds entitled their owners to a lien on the part of the Wabash main line extending from Toledo to the Illinois State line. The cause was removed to the Federal circuit court and resulted in a decree sustaining the lien. (Wabash, St. Louis & Pacific R'y Co. *vs.* Ham, 114 U. S., 587; S. C. below, 15 Fed. Rep., 763.) It was appealed to the Supreme Court of the United States, the decree of the lower court was reversed and the bill of complaint was dismissed. To this action Compton never became a party. When he began his suit the Indiana action had been discontinued. It was subsequently revived, however, and then for the first time a lien was asserted under the consolidation statutes. Compton's counsel did file a brief in the Supreme Court, but he paid no part of the expense of the suit.

In 1880 pending the suit in the Indiana court, but prior to the rendition of the Indiana decree, Compton began a suit in the common pleas court of Lucas county to establish and enforce a lien on the railroad extending from Toledo to the Illinois State line by virtue of his ownership of $150,000.00 of the par value of these equipment bonds. Compton made parties to this suit all the railway companies succeeding the Toledo and Wabash R'y Company (which issued the equipment bonds) in the ownership of the property and all the mortgagees whose mortgages were executed, after the issuance of the bonds, except the Central Trust Company and Cheney, trustees, who took their mortgage pending the appeal from the common pleas decree. Neither the Farmers' Loan & Trust Company nor E. D. Morgan, trustees of the underlying Ohio divisional morgages were parties.

In March, 1882, the common pleas court entered a decree sustaining the lien claimed and ordered a sale of the part of the railroad in Ohio to pay the amount of the bonds found due, subject to the prior lien of the mortgages of the Farmers' Loan & Trust Company and E. D. Morgan trustee on the same property. The cause was

appealed to the district court of the proper judicial district and by that court reserved for decision to the supreme court of the State, which in 1888 sustained the rulings of the common pleas court (Compton *vs.* Railway Co., 45 O. S., 592) found that the amount due on Compton's bonds was $339,920.40 with interest, from May 1st, 1888, and that this amount was a lien on the railroad in Ohio and Indiana and ordered that on default in the payment of the amount due after ten days the Ohio part of the road should be sold to enforce the lien.

The finding and action of the supreme court of Ohio sufficiently appeared from the 5th and 6th paragraphs of its decree as follows:

"That upon the consummation of such consolidation, said bonds issued as aforesaid by the Toledo & Wabash Railway Company known as equipment bonds, and all moneys due and to grow due thereon and among them such of said bonds as are now owned, as aforesaid, by the plaintiff, and the moneys due and to grow due thereon, became an equitable lien upon all of the said railroad and real property and the structures thereupon and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consolidation and which through said consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company, and which afterwards passed to and vested in the defendant, The Wabash, St. Louis & Pacific Railway Company, which last-named company was, at the time of the commencement of this suit, in possession of the same, being all of its railroad and property connected therewith, commencing in the city of Toledo in the State of Ohio and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance and Paulding in said State and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county, and that said bonds are now a lien on such railroad and property and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates, claims and liens of the defendants in this section and each of them, in and upon said railroad and property upon which said lien is hereby declared and is prior and superior to the rights, interests, estates, claims and liens of all persons and corporations who have derived any such rights, estates, claims and liens from, by or through the said defendants, or any of them since the commencement of this action or otherwise; but as to all that part of said railroad and property which is situate within the State of Ohio, such lien is inferior and subject, but inferior and subject only to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company on the eighth day of September, 1853, for the security of the bonds of that company amounting to $900,000, due as extended August 1st, 1890, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on

the first day of February and August in each year, and the other of which was executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, on the fifth day of October, 1858, for the security of the bonds of that company amounting to $1,000,000, due on the first of November, 1878, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first day of May and November in each year.

6. That the said defendants or any of them pay to said plaintiff the said sum of $339,820.40 now due on said bonds owned by the plaintiff as aforesaid within ten days from the entry of this decree, and if default shall be made in such payment, that an order of sale, issue for the sale as upon execution at law, of all said railroad and real property together with the structures thereupon and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds, known as equipment bonds is hereby declared to exist, which is situated in the State of Ohio and the jurisdiction of this court, subject however, but subject only to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, and the Toledo & Wabash Railroad Company to
16 Edwin D. Morgan and to the indebtedness secured by each of said mortgages and that from the proceeds of such sale the costs of this action as taxed to be paid, and the residue of such proceeds be brought into court to abide its further order herein on the footing of this decree. That before offering the property, hereby directed to be sold, for sale, the officer conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property subject to the incumbrance and lien of the two mortgages hereinbefore mentioned, as executed respectively by the Toledo & Illinois Railroad Company and the Toledo & Wabash Railroad Company, subject to which it is directed to be sold and over and above the lien of such mortgages according to the amount of the indebtedness secured thereby, as the same shall be ascertained by the officer conducting such sale, with interest computed to the time of the sale."

After this case had been appealed to this court and before the hearing, a motion was made by appellees to dismiss the appeal or affirm the decree of the court below on the ground that since the rendition of the decree herein, a decree had been rendered in the United States circuit court for Indiana on the same cause of action limiting Compton's remedy to a redemption of the four senior mortgages, two in Ohio and two in Indiana, and no appeal had been taken from that decree—and the record of the Indiana suit was filed to establish ground for the motion. The record shows that the Indiana decree was exactly like that from which this appeal was taken, and contained the same provision in respect to Compton's lien requiring him to redeem the Ohio and Indiana divisions by payment of the amount due on both the Ohio and the Indiana divisional mortgages, with interest within ten days, and in default of

such payment he should be taxed with the costs of all the matters in connection with his intervention.

Because the court find difficulty in reaching a conclusion with reference to the following questions it is ordered that upon the foregoing statement of facts the following three questions, concerning which this court requests the instruction of the Supreme Court of the United States for its proper decision, be certified to that court, in accordance with section six of the act to establish circuit courts of appeals, approved March 3, 1891. The said questions are:

First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only?

Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed, reduced by the net earnings received by the purchaser?

Third. Is the decree of the circuit court of the United States for the district of Indiana between the same parties and unappealed from *res judicata* upon the foregoing questions in this court?

17 It is further ordered, for the convenience of the Supreme Court of the United States, that the opinions of Judge Taft and Judge Lurton in this cause be also certified to the Supreme Court of the United States.

It is also further ordered that all proceedings of the cause be stayed until the instructions of the Supreme Court upon these questions shall be received by this court.

WM. H. TAFT,
HORACE H. LURTON,
AUGUSTUS J. RICKS,
Sitting as Judges of the Circuit Court of Appeals for the Sixth Circuit.

18 THE UNITED STATES OF AMERICA, *For the Sixth Circuit,* } *ss:*

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate in the case of John C. Compton, appellant, *vs.* James R. Jessup and Edward H. Dixon *et al.*, appellees, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Cincinnati, this 15th day of July, A. D. 1895.

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

19 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1892.

JOHN C. COMPTON, Appellant, *vs.* JAMES R. JESSUP and EDWARD H. DIXON *et al.*, Appellees.	No. 84. Appeal from the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Before Taft and Lurton, circuit judges, and Ricks, district judge.

Opinion of Taft, Circuit Judge.

TAFT, circuit judge, after stating the case delivered the opinion of the court.

The first ground pressed on us by appellant's counsel, for reversing the decree of the circuit court is that there was no jurisdiction to enter it. The contention is first that the circuit court had no power to entertain and grant relief on the bill of Knox & Jesup because the parties to it had not the necessary diverse citizenship, and second, that no power existed to bring in Compton because, he being a citizen of the District of Columbia, his presence as a party would destroy the necessary diversity of citizenship even if it before existed.

It must be conceded that the circuit court had no jurisdiction to hear and determine the controversies presented by the Knox and Jesup bill on the ground of diverse citizenship of the parties, for it did not exist. The jurisdiction was assumed on a very different ground. When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox &
20 Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness.

It is true, the litigation had proceeded to foreclosure sale and final decree, but for some reason not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed could grant such relief. Whether other courts could decree foreclosure and marshal liens or not, certainly no other court could take possession of and sell the road and deliver an unclouded title to a purchaser. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction

pending its possession of the railroad, to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox & Jesup. Their mortgage was then due; they were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They, therefore, properly appealed to the court below as the only tribunal which could do so, to give them adequate relief at once, and this was properly accorded to them without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court.

Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court though of equal and co-ordinate jurisdiction should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down, by the Supreme Court of the United States in a long line of cases. Hagan *vs.* Lucas, 10 Pet. 400; Williams *vs.* Benedict, 8 How. 107; Wiswall *vs.* Sampson, 14 How. 52; Peale *vs.* Phipps, 14 How. 368; Bank of Tennessee *vs.* Horn, 17 How. 151; Pulliam *vs.* Osborn, 17 How. 471; Freeman *vs.* Howe, 24 How. 450; Yonley *vs.* Lavender, 21 Wall. 276; People's Bank *vs.* Calhoun, 102 U. S. 256; Barton *vs.* Barbour, 104 U. S. 126; Krippendorf *vs.* Hyde, 110 U. S. 276; Covell *vs.* Hyman, 111 U. S. 176; Heidritter *vs.* The Elizabeth Oil Cloth Company, 112 U. S. 294;
Gumbel *vs.* Pitkin, 124 U. S. 131; Rio Grande R. R. Co. *vs.*
21 Gomila, 132 U. S. 478; *Ex parte* Tyler 149 U. S. 181; Porter *vs.* Sabin, 149 U. S. 473; Byers *vs.* McAuley, 149 U. S. 608. Again every court has inherent equitable power to prevent its own process from working injustice to any one and may entertain a petition by the aggrieved person either in the form of a simple motion or by intervention *pro interesse suo* in the cause in which the process issued or by ancillary or dependent bill in equity and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the Supreme Court in Freeman *vs.* Howe, 24 How. 450; Minnesota Company *vs.* St. Paul Company, 2 Wall. 609–633; Railroad Companies *vs.* Chamberlain, 6 Wall. 748; Krippendorf *vs.* Hyde, 110 U. S. 276; Pacific Railroad of Missouri *vs.* Missouri Pacific R'y Co., 111 U. S. 505; Stewart *vs.* Dunham, 115 U. S. 61; Phelps *vs.* Oaks, 117 U. S. 236; Dewey *vs.* West Fairmount Gas Company, 123 U. S. 329; Gumbel *vs.* Pitkin, 124 U. S. 131; Johnson *vs.* Christian, 125 U. S. 642–646; Morgan's Co. *vs.* Texas Central Railway, 137 U. S. 171.

Now, it frequently happens that under the process of the Federal courts exercising the original and lawful jurisdiction conferred expressly by the Federal constitution and statutes, possession is taken

and control exercised over property in which persons not indispensable parties to the suit have an interest by lien, mortgage and in other ways. In such cases, there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the Federal court in hearing an independent suit between them. But it may be essential to preserve intact their rights in the property that such third persons should be permitted at once to have specific relief, which can only be granted by a court having possession and control of the property. And yet in accordance with the principle already stated, no court but the Federal court can exercise possession and control over the property in its custody. Of necessity, therefore, the Federal courts exercise an ancillary jurisdiction in such cases, and third persons are permitted to come into the Federal court and set up their interest in the property and secure the same full and adequate protection and relief to which they would be entitled in any court of competent jurisdiction, were the property not impounded in the Federal court.

In Freeman *vs.* Howe, 24 How. 450, a sheriff under a replevin from a State court sued out by mortgagees of a railroad company ousted a United States marshal from possession of certain railroad cars attached by him under mesne process from a Federal court. The act of the sheriff was held void without respect to the merits of the conflicting claims of the plaintiffs in the two proceedings, because the cars were in the custody of the Federal court and beyond the reach of the sheriff when he served the replevin. And it was answered to the argument that in this way the replevying mortgagees were left remediless, because their citizenship prevented re-
course to the Federal court, that the Federal court, to prevent
22 such abuse of its process, had jurisdiction ancillary to its original jurisdiction, asserted in the attachment, to afford the mortgagees all the relief they could obtain in any court where the jurisdiction was not limited by citizenship.

In People's Bank *vs.* Calhoun, 102 U. S., 256, a Federal court had taken possession by its receiver of the mortgaged railroad in a foreclosure suit. In an action between other parties an attachment was sued out and levied upon the road. It was held that the Federal court having drawn to itself the subject-matter of the litigation had acquired the right and jurisdiction to decide upon all conflicting claims to the possession and control of the road, and that the attachment suit which had begun in the State court could be properly removed by stipulation of the parties to the Federal court, because, in the language of Justice Miller:

"The parties did no more than what they could have been compelled to do by the injunction of the latter (that is the Federal court) and what would have been done by such compulsory order if they had not submitted to it by agreement."

In Krippendorf *vs.* Hyde, 110 U. S. 276, a marshal on mesne process issuing out of the Federal court attached property, as the property of the defendant, in the possession of another who claimed to own it. It was held that this other, although a citizen of the same State as the defendant might seek redress in the Federal court either

by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances. In this case Mr. Justice Mathews reviews the decision and language of Mr. Justice Nelson in the case of Freeman *vs.* Howe and speaking for the court fully approves the same. He said—"It has been sometimes said that this statement was obiter dictum and not to be treated as the law of the case; but it was in point of fact, a substantial part of the argument in support of the judgment, and, on consideration, we feel bound to confirm it in substance as logically necessary to it. For if we affirm as that decision does, the exclusive right of the circuit court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and as this may not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right."

23 In Gumbel *vs.* Pitkin 124 U. S. 132, a United States marshal by invalid process issued from a Federal court took possession of property. A sheriff sought to levy on the property by virtue of a lawful attachment for a State court and left it with the marshal as garnishee. Subsequently the marshal sold the property under a valid process coming to his hands after the sheriff's attempt at garnishment. It was held that the plaintiff in the State attachment proceedings might intervene in the Federal court and be awarded the priority to which he would have been entitled, had the sheriff been permitted to make an actual levy under his writ.

Said Mr. Justice Mathews in summing up the conclusion of the court:—"The case, therefore, stands thus: For the reasons growing out of the peculiar relation between Federal and State courts exercising co-ordinate jurisdiction over the same territory, the circuit court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto; the plaintiff in error having pursued his remedy by action against his debtor in the State court to which alone by reason of citizenship he could resort, attempted the levy of his writ of attachment upon the goods in the possession of the marshal; not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee; not being able by this process to subject the marshal to answer personally to the State court, he made himself a party to the proceedings in the circuit court by its leave, and proceeded in that tribunal against its officer and the creditors for

whom he had acted; on a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual. It was competent for the circuit court, and having the power it was its duty, to hold the marshal liable as garnishee, and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties on the footing of these rights, and give to the plaintiff in error the priority over all other creditors, to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled."

The case most like the case at bar is that of Morgan's Company *vs.* The Texas Central Railway Company and others, 137 U. S. 171. In this suit the complainant company, a citizen of Louisiana, filed a bill in a circuit court of the United States sitting in Texas against the Texas Central Railway Company, a citizen of Texas, against the Farmers' Loan & Trust Company, a citizen of New York, and the Metropolitan Trust Company, a citizen of New York, seeking to have certain debts owing by the Texas Central Railway Company to it declared a lien on the railroad of the railway company, prior in right to mortgages upon the same road held by the other defendants the two trust companies. A receiver had been appointed
24 in the original suit. Subsequently the Farmers' Loan & Trust Company filed its cross-bill against the complainant and its codefendants including the Metropolitan Trust Co. As the two trust companies were citizens of the same State, New York, the jurisdiction of the court could not be maintained to give relief on the cross-bill if it depended on diverse citizenship. Objection was taken to the action of the court in granting foreclosure upon the cross-bill but the objection was not sustained in the Supreme Court of the United States. Said the Chief Justice on page 201:—"It may be that, so far as it sought the further aid of the court beyond the purposes of defence to the original bill, it was not a pure cross-bill, but that is immaterial. The subject-matter was the same although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought.

* * * * * * *

And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject-matter in litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

The clause in the foregoing which we have italicized shows clearly

that the ancillary jurisdiction of the Federal court growing out of its possession of property may be invoked by original bill as well as by intervening petition.

Other cases to the same point are Central Trust Company *vs.* Bridges, 6 C. C. A. 539; Conwell *vs.* Canal Company, 4 Bissell 195; Carey *vs.* Houston & Texas Central Railway Company, 52 Fed. Rep. 671.

The bill of Knox & Jesup was, therefore, cognizable by the court below as ancillary to the litigation in which the mortgage of the Central Trust Company and Cheney trustees was foreclosed. That, it will be remembered, was a consolidation of the insolvency bill filed by the Wabash, St. Louis & Pacific Railway Company against the Central Trust Company and others, and of the foreclosure bills of the Central Trust Company removed from the State court. Some claim is made that the Federal court had no jurisdiction to entertain the insolvency bill because such a proceeding was without precedent. Whether precedents in equity practice and jurisprudence justified the bill was for the decision of the court in which the bill was filed. It cannot be reviewed in this proceeding, which, while dependent on that and ancillary to it, is collateral to it in so far as to prevent an examination of the correctness of the
25 orders and decrees made in it. Quincy Railroad Company *vs.* Humphreys, 145 U. S., 82; Mellen *vs.* Moline Iron Co., 131 U. S., 352. The jurisdictional fact upon which the right of the court below to hear and determine the cause of action presented by Knox & Jesup's bill rested, was the pending possession by that court's receivers of the property sought to be sold in foreclosure. Johnson *vs.* Christian, 125 U. S., 642-646. It was unnecessary to look further, for even if the order under which that possession had been taken was irregular or erroneous, Gumbel *vs.* Pitkin; Krippendorf *vs.* Hyde, and Freeman *vs.* Howe, cited above, all show that such possession would impose upon the court, the duty, and would draw to it the jurisdictional power of granting any relief requiring for its full measure, the possession and control of the property.

It is further objected that the court below had no power to take possession of the railroad property by its receivers in 1884 pending the suit of Compton in the common pleas court to subject the property to the payment of his liens. The argument is that Compton's suit was in the nature of a proceeding *in rem* which impounded the property and excluded any other court from assuming actual possession of it. Heidritter *vs.* The Elizabeth Oil Cloth Company, 112 U. S., 294 is cited in support of this proposition. That was an ejectment suit. The plaintiff claimed under a sheriff's deed executed to a purchaser at a judicial sale by order of a State court in a proceeding to enforce a mechanic's lien against the premises in controversy. The defendant claimed under a marshal's deed executed to the purchaser at a judicial sale by order of a Federal court in a proceeding under the internal-revenue laws to forfeit the premises, because used for illegal distilling. When claims for the mechanic's liens were filed and suits were brought to enforce the

same in accordance with the New Jersey statute, the premises were in the actual custody of the U. S. marshal who had taken possession under process of attachment issued on an information to enforce a forfeiture, which resulted subsequently in a sale and the deed under which defendant claimed. The sale under the proceedings in the State court took place a few days after that by the U. S. marshal. It was held that proceedings begun in the State court in the nature of proceedings *in rem* to subject the premises to sale were ineffectual to confer any legal title on a purchaser, if at the time they were begun the property was in the actual custody of the Federal court for the purpose of a judicial sale by the latter court. It was not decided, however, that the proceedings in the State court might not be valid to establish the lien. The holding was expressly limited to the point that a deed under the State proceeding vested no legal title as against the title conferred by the court first having actual custody of the property. It was the actual custody of the premises in the Federal court which excluded the right of another court to entertain jurisdiction of a proceeding to subject the property, thus removed from its control and disposition, to a sale for the purpose of vesting a title superior to that which might be conferred by the Federal court.
26 Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions, it is manifest that there can be no constructive possession by one court where it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. For this reason, even if the proceeding in the Lucas common pleas to establish Compton's lien was a proceeding in rem, it did not involve the actual seizure of the property pending the suit, and did not therefore prevent the Federal court from taking actual possession of the property through its receivers in a proceeding to foreclose mortgages and other liens than Compton's. This objection to the jurisdiction of the court below over the Knox & Jesup bill cannot therefore, be sustained.

We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the Federal court to grant relief to persons claiming an interest in property in its custody without regard to their citizenship is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court against his will simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded for the purpose of the argument that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the Federal court's possession of the *res*. He was brought into court to prevent prejudice to Knox & Jesup who, otherwise having no right to invoke the action

of the Federal court, did so on the ground that its possession of the *res* prevented their getting full and adequate relief in the State tribunals and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, and this could not be done without Compton's presence. Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpœna. Knox & Jesup's bill was however a proceeding against property in the jurisdiction of the court. It was competent for Congress in such a case to provide for constructive service which would bind the person against whom it issued to the extent only of the *res* which lay within the territorial jurisdiction of the court. Pennoyer *vs.* Neff, 95 U. S. 714, Heidretter *vs.* Elizabeth Oil Co., 112 U. S. 294, 300, 301. Statutory provision of this kind is found in section 8 of the act of March, 3rd 1875, 18th, Statutes at Large 470, which was not repealed by the jurisdiction act of March 3rd, 1887, (24 Statutes at Large
27 552,) or of August 13th, 1888, (25 Statutes at Large, 433) and is still in force. It provides: "That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided only the circuit court of the United States in which the proceeding is taken, has otherwise jurisdiction of it. Whether it be a suit arising under the laws and Constitution of the United States, or a suit to which

the United States is a party, or a suit in which there is a controversy between citizens of different States, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of Brigham *vs.* Luddington, 12 Blatch. 237: 4 Fed. Cases, 124, has nothing in it to conflict with this conclusion. In that case Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property because he was a citizen of the same State as the complainant and his presence as a party would oust the jurisdiction of the court. The bill was an original one and the jurisdiction could only rest on diverse citizenship. In the suit at bar Compton's presence as party defendant would not oust the jurisdiction of the court because as already shown it is not dependent on diverse citizenship. The circuit court had jurisdic-
28 tion of the cause otherwise than by virtue of the section above quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was, therefore, properly brought into court by the substituted or constructive process provided in the section above quoted. Farmers' Loan & Trust Co. *vs.* Houston & T. C. R'y Co., 44 Fed. Rep., 115; Greeley *vs.* Lowe, 155 U. S., 58.

Having disposed of the jurisdictional objections to the decree below, we now come to consider the merits of the case. We fully concur with the court below in its holding that the decree in the Tysen or Ham suit in Indiana did not bind Compton or prevent his pursuing his remedy in the court of Ohio if he chose to do so. The bill in the Tysen suit only made parties to it, those equipment bondholders who chose to come in and contribute to the expenses of it. Compton did not do either. The Ham decree was no bar to Compton's prosecuting the Ohio decree in his favor for the reasons which we quote from the opinion of the learned circuit judge in the court below.

"First. Because he was not a party to that proceeding and did not appear therein. Second. Because the Ham suit was not, in its inception or at the time Compton commenced his action in the State court, such a class suit, or so representative in its character as to bind him without his being or becoming an actual party thereto; (Pomeroy's Remedies and Remedial Rights, 2nd ed. 396–399); and third, because if the Ham suit had been so representative in its character as that the decree of the supreme court therein could or would have concluded said Compton on the question of the lien of the equipment bonds, neither the pendency of said suit nor the decree of the supreme court was ever interposed by the defendants to his suit in the State courts, either by way of abatement or in bar thereof, although ample time and opportunity so to do was afforded them. (Grant *vs.* Ludlow, 8 Ohio St., 1; Davis *vs.* Mathews, 39 Ohio St., 45; Dimick *vs.* Revere Co., 117 U. S., 570.)"

We come next to the question whether the Ohio divisional mort-

gages cover the Toledo terminal property. The facts appear in the statement of the case at length.

The propositions of Compton's counsel are as follows: First. No property can be included in an after-acquired-property clause in a railroad mortgage except that which is acquired by the mortgagor or its successor in title by virtue of the franchises under which the mortgagor issued the mortgage. Second. The Toledo terminals were acquired by the Toledo & Wabash Railway Company which being a consolidated company of Ohio and Indiana took them under new franchises received directly from the State and not under old franchises received by assignment from its predecessors in title to the railroad. Therefore the terminals are not included in the after-acquired-property clauses of mortgages executed by such predecessors.

29 The extent of the property included in the grant of a mortgage by a railroad company depends on two questions. First, what property had it the power to mortgage, and, second, what property did it intend to mortgage?

Section 3287 of the Revised Statutes of Ohio in force at the time of the issuance of the divisional mortgages permitted railroad companies of Ohio to issue bonds and notes and to secure them by a pledge of their property and income. It was held by the supreme court of Ohio that the power to mortgage property and income included power to mortgage after-acquired real and personal property. "The pledge is to be all the property and income. The income intended must have been the future income and was to be produced by property in possession and to be acquired. If the future product can be conveyed, why not that by which it is credited?" Coe *vs.* Railroad Co., 10 Ohio State, 372–393. Pennock *vs.* Coe, 23 How., 117. We have no doubt that, under these two decisions, a railroad company authorized by its charter to build and operate a railroad between two named points would have the power to mortgage its road then built or to be built by itself or by any successor in title to the same railroad whether exercising the mortgagor's franchises or similar franchises granted by the same sovereign. What is mortgaged is the property and all accretions to the property possible within the limitations of the then charter, and it does not seem to us material whether the successor in title to the railroad acquires such accretions under the same franchises as those under which the road was first projected and constructed or under new franchises of the same effect and character. It may be conceded that, under the decision of Shields *vs.* Ohio, 95 U. S., 319, and other cases, the consolidated corporation acquired its franchises anew from the State and not from its predecessors in title, but the acquisition of terminal property at Toledo was as much permitted under the franchises enjoyed by the divisional mortgagors as under those under which it was actually acquired, and such terminal property would have been as properly appurtenant to the Ohio division as to the consolidated line. The right to mortgage after-acquired property is not necessarily dependent on the right to mortgage franchises. There is nothing in the case of *Coe vs. The Railroad*, or of *Pennock*

vs. Coe, to justify such a view. The supreme court of Ohio as we have seen based its decision, that power existed to mortgage after-acquired property, on the provision of the statute that property and income might be pledged. Indeed under the Ohio statute, it is doubtful whether the company had any right to mortgage its franchises. The decision of the Supreme Court of the United States in Pennock *vs.* Coe does not deal with the question of franchises and does not make its conclusion in the case depend thereon. We are of opinion therefore that an Ohio railway corporation has the power to mortgage its railroad and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or any successor in title, whether the road be then maintained by virtue of the original franchises or of franchises newly acquired from the State.

The question remains therefore, What did the mortgagors intend to mortgage? Did they intend to limit the effect of the after-acquired-property clauses to that which was acquired under their own franchises, or did they intend to make the clauses cover every addition and accession to the same railroad which they were constructing and operating, whether that railroad passed into the hands of a new company with new franchises or continued in operation under the then franchises. There can be no doubt of the intention of the parties upon this point. It was the road of the two mortgagor companies made and to be made together with the necessary depot grounds and depot buildings erected and to be erected. What was the road? It was the road running from Toledo to the west line of Paulding county. No question can be made of its identity. It is not disputed that the Toledo terminal property here in question is a proper part of this railroad which the original Toledo & Illinois Railroad Company and its successors in title had full charter powers to build and operate. It was obviously the intention of each of the mortgagor companies that whatever was added to the railroad at each of the terminal points named for use as part of it should be embraced by the mortgage. Every person or company acquiring the railroad thus described or any interest in it, from the mortgagor companies, took title subject to the mortgages thus construed and in making additions or accessions within the terms of the mortgage was estopped by privity of title with the mortgagor companies to deny that such accretions were subject to the mortgage lien. Galveston R. R. Co. *vs.* Cowdrey, 11 Wall., 459–481.

The mortgage of the Toledo & Wabash R. R. Co., the Ohio constituent of the Toledo & Wabash Railway Co., expressly recognized that the Toledo & Illinois mortgage the first Ohio divisional mortgage, was a lien prior in right upon its road constructed and to be constructed and its terminal property acquired and to be acquired and upon that same property, it imposed the lien of its own mortgage as a second or junior lien to that of the Toledo & Illinois R. R. Co. In this junior mortgage, the mortgagor makes reference to the probability of its consolidation with another company and a few days thereafter, really as part of the same transac-

tion, it made the agreement of consolidation which resulted in the Toledo and Wabash Railway Company. It certainly could not have intended that the after-acquired-property clause in its mortgage was to have no effect except during the few days before it should be consolidated into the Toledo & Wabash Railway Company. Manifestly it intended that its mortgage should cover all the property acquired by the newly consolidated company which was a legitimate accession to the railroad it proposed to contribute to the new company. It is immaterial what construction would have been put upon the first divisional mortgage (that of the Toledo & Illinois R. R. Co.) standing alone. The second divisional mortgage expressly recognizes the lien of the first mortgage as
31 covering the same property acquired and to be acquired which the second divisional mortgage covers. As the second divisional mortgage was necessarily intended to cover property acquired by the Toledo & Wabash R'y Co., the successors in title to the railroad are estopped to deny by the recitals of the second mortgage that the first mortgage did not cover the same property as the second. Hence our conclusion is that both divisional mortgages were intended to cover the legitimate accretions to the railroad running from Toledo to the Indiana line, properly appurtenant thereto. It is conceded that the Toledo terminals come within this description.

We next come to the form of relief to which Compton's decree entitled him in the court below. Whether the decree established in his favor an indivisible lien on the railroad extending from Toledo to the Illinois State line, or a lien on the Ohio division only, it is certain that it was junior to the Ohio divisional mortgages and also to the Indiana divisional mortgages, if it extended to Indiana. As Compton was properly made a party to the action of foreclosure by the divisional mortgagees, a sale in such a proceeding would ordinarily pass to the purchaser a title clear from Compton's lien which would be transferred to the proceeds of sale and would be satisfied out of what should remain after the satisfaction of the prior divisional mortgages. If the amount realized by the sale was not sufficient to pay the prior mortgages, Compton's lien would entitle him to nothing, but the railroad in the hands of the purchaser would nevertheless be forever discharged from its encumbrance. The record discloses that the amount realized at the sale from the Ohio division was not more than enough to pay the divisional mortgages, while the Indiana division did not bring enough to pay in full its second divisional mortgage. Unless there was something in the decree for sale which held the railroad in the hands of the purchaser still subject to Compton's lien, his lien was foreclosed and his remedies were exhausted by the sale. This brings us to the proper construction of the so-called saving clause in the decree. At the time the mortgagees were pressing the court below to order a sale, in March, 1889, it had just decided that Compton was properly brought into court and that he must answer. The averments of the bill and cross-bills which he was required to answer attacked the validity of his Ohio decree and the lien thereby declared and

the prayer was that he might be forever barred from enforcing either. The proposed decree for sale fixed the amount due on, and the priority of, every mortgage set up in the cause. The purchasing committee of reorganizing bondholders had, we may infer from the schedule of bonds afterwards deposited by them as well as from their purchase of the road under the previous foreclosure, bonds of every class to enable them safely to make bids of large amounts and to protect the interests of those whom they represented. Compton was an outsider and presumably was not in the scheme of reorganization. He had no mortgage bonds with which to pay a substantial part of the purchase price. He must raise at least $2,500,000 in cash before he could bid even on the Ohio
32 division and he could not save his lien except by a bid of $350,000.00 more. If his lien was invalid, he would have involved himself to the extent of $3,000,000.00 for no especial or certain benefit to himself. The purchasing committee representing nearly all the bonds with a plan of reorganization in which all bonds of every class would be represented might make its bid low enough to exclude any proceeds available for Compton and yet not injure the bondholders under mortgages subsequent to Compton's lien. It was necessary for him to bid to save anything and yet he did not know that he had anything to save. Considering the great disadvantage that he would have been under in bidding to protect himself against so powerful a combination of bondholders without certainty as to the validity of his own lien, it is not surprising that his counsel vigorously objected to a sale before his rights in the property should be determined. On the other hand, it was of course, greatly for the advantage of the bondholders to have the road sold, and the expenses of the litigation and receivership ended. The court overruled Compton's objection and ordered the sale but to prevent the palpable injustice to Compton which the circumstances would otherwise cause, the court inserted in the decree the saving clause under discussion. It may be conceded that it was within the legal discretion of the court below to order a sale before fixing all priorities or settling the validity and place of any particular lien, and that too, without any saving clause such as the one we have here. Shedd *vs.* The Bank, 121 U. S. 74; Mellen *vs.* Moline Iron Company, 131 U. S. 352. But looking to the hardship to which Compton would be subjected by such an early sale, the court, while making the order, very properly attempted to put Compton in a position where he would not suffer from a sale in advance of the decision of his rights. That this was the motive and intention of the court may be clearly inferred from the circumstances already stated and from the language of the following recital in the decree by which the saving clause is introduced. "And the defendant James Compton having in open court on the final hearing objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainant's amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant, James Compton, to be

filed herein, have not been tried and determined, the court overruled such objection and the defendant James Compton, duly excepts to such ruling and the entry of this decree. *But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions.*"

Express language could hardly be plainer than the implication from the foregoing italicized words that the clause about to follow was intended by the court to be a means of relieving Compton from the great disadvantage which an early sale would put him
33 under. In this light is the saving clause to be construed. The court said in effect to the mortgagees pressing for a sale, "The sale will be ordered, but as a condition, and for the purpose of preventing injustice to Compton, its effect shall be limited."

Shortly stated, the first paragraph of the condition provides that if Compton's Ohio supreme court decree and the lien therein adjudicated in his favor are found to be in full force and effect, then within ten days from the decree in his favor the purchaser or his successor in title shall pay the full amount of the lien, and "in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant, James Compton, and enforce such decree as it may render herein in his favor by resale of such property or otherwise as this court may direct." If this paragraph stood alone, it might well mean that the purchaser should take the property burdened with the Compton lien, if adjudged valid, as a first lien and that in default of his paying it, the property should be sold again to satisfy it, in this way giving it precedence over even prior mortgages. But the second paragraph clarifies the meaning of the first and shows that the resale, if ordered, was to be a sale like the first, the proceeds of which would be applied to the mortgage and liens in the order of their priority. It provides, first, that, notwithstanding the sale, Compton's lien shall proceed to a decree which shall bind the purchaser at the sale in respect of any property affected by the lien. It provides, second, that nothing in the decree of sale shall be construed to be an adjudication against Compton or "to prejudice, annul or abridge any right, claim or interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he *now* stands towards the mortgagees parties hereto."

The purpose which is manifest in the first paragraph and which is made to appear again in the second paragraph is that the person affected by this condition inserted to save Compton's rights is the purchaser. It is he or his successor in title who is to pay the lien or give up possession. It is he or his successor in title who is to be bound by the decree in Compton's favor. The inference is irresistible that Compton's lien was not to be transferred by the sale from the property to the proceeds of sale.

Otherwise the purchaser could not be affected by the decree, for

every obligation on his part would be discharged by paying and completing his bid. The further provision that nothing in the decree of sale was to be construed to prejudice, annul or abridge any right or lien which Compton had in the property ordered sold, is another assertion that the sale was not to disturb Compton's lien on the property. And the final clause only enforces the
34 same purpose by declaring that Compton's rights were to be preserved in the relation in which he stood toward the mortgagees at the time the decree of sale was entered and before the sale. Taking the two paragraphs together, it is reasonably clear that the court intended the purchaser to take the property subject to Compton's lien and in case the lien should be held valid, to have the option either of paying the lien off or of permitting the court to resume possession and enforce Compton's lien by such remedy as it should deem equitable, whether by resale or otherwise. If the purchaser should be of the opinion that a resale free from Compton's lien would bring enough more than the price at the first sale to pay the lien off, he would doubtless prefer to satisfy it rather than to permit a resale or even a redemption of the prior mortgages to which he would be subrogated. If on the other hand, he should think that the price at a resale would not be increased over that at which he bought, in an amount sufficient to pay Compton's lien, he would doubtless exercise the option of permitting the court to resume possession and to resell, or to decree a redemption. The purpose of the court was to give Compton the amount of his lien, or to restore to him the *status quo ante* at the option of the purchaser. Compton's relation to the property covered by his lien was not intended to be changed by the early sale. If the lien was not paid, he was to have the same remedy against the purchaser which he would have had, if he had not been a party to the suit. The purchaser would acquire all the rights of all the mortgagees whose mortgages were foreclosed, as well as those of the mortgagor, and Compton's remedy was to be such as equity would give him against the mortgagor and such mortgagees. The character of that remedy must be determined wholly apart from anything in the decree for sale because the saving clause leaves it entirely in the judgment of the court. The enforcement of the lien is to be by resale or otherwise after the default and the resumption of possession by the court. It seems to be clear that the word "otherwise" is wide enough to include any other remedy than resale, suitable to the case. If redemption is such a remedy, the court was within the terms of the saving clause in granting it. Objection is made that it was not necessary before decreeing redemption for the court to resume possession of the property and therefore that the "otherwise" could not include such a remedy, because it must have referred to some remedy, to afford which, possession by the court was necessary. This is too narrow and literal a construction of the power reserved by the court. It would certainly not prevent a decree for redemption, if the court did take possession, and the provision that it should do so was not therefore inconsistent with a reservation of the power to make such a decree, if the court saw fit. In other words, the saving

clause simply remits us to the Ohio supreme court decree to determine therefrom by general rules of equity practice and jurisprudence as they may be modified by local law, what relief should have been granted to Compton in the court below.

It is suggested for the first time in this court that the
35 saving clause was not intended to prevent the transfer of Compton's lien from the property to the proceeds of sale, but that it was inserted merely to give the court power, in case Compton's lien should subsequently be held valid, to compel any purchaser, who had paid his bid in bonds under subsequent and junior mortgages, as permitted by the decree, to replace the same with cash sufficient to pay Compton's lien if the amount of the bid was large enough to leave a balance for application to that lien after satisfying prior mortgages. The decree for sale was approved by Judges Jackson and Gresham at Chicago, though it was formally signed by Judge Brown in the court below. Those judges certainly understood that Compton's lien remained on the property after the sale and was not transferred to the proceeds because otherwise, they would have had no power to decree redemption in Compton's favor as they subsequently did. The provision in the decree permitting payment of bids in bonds at the option of the purchaser was wholly inadequate as a reason for the insertion of so elaborate a saving clause. The provision was that there should be paid in cash of the price at which the property should sell, in addition to an amount required as a deposit at the time of the sale, such further sum as the court might thereafter direct. "The remainder of such purchase price may be paid either in cash or in bonds, with overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the purchase price were paid by the purchasers in cash." If the saving clause had been inserted in the decree to prevent injustice to Compton from this provision, it is impossible to explain why language was not used especially referring to the bond provision and directing a substitution of cash for bonds by the purchaser. More than this, the purchaser was not obliged to pay in bonds. He was at liberty to pay cash and yet the saving clause applies to every purchaser whether he paid in cash or in bonds. Every purchaser was required to pay Compton's lien or give up possession of the property to the court for a resale or other remedy. If its purpose was as stated, why was not an exception introduced in favor of purchasers paying in cash? Take another instance and the one which did occur, namely that the bid should be paid partly by cash and partly by first-mortgage bonds conceded to be prior in right to Compton's lien. Compton if remitted to the proceeds, could not have complained of the use of such bonds to pay the purchase price, and yet the saving clause in its terms is just as applicable to such a purchaser as to one who deposited bonds secured by a mortgage junior to Compton's lien.

More than this, there was ample provision for securing the payment in cash of so much of the proceeds as would belong to Compton in other parts of the decree, and the saving clause as construed

was mere meaningless surplusage. All question of the disposition of the proceeds arising from the sales under the decree were reserved for future adjustment. The jurisdiction of the court over the property sold and its right to take possession of it was continued
36 after delivery to the purchaser until all claims allowed or to be allowed against the property of the defendant company should be paid. And in the order directing execution of a deed and the delivery of possession, express provision was made for the substitution of cash for bonds deposited as the court might direct, and a retaking of possession on failure by the purchaser to comply. In fine, the reference of the saving clause to a possible injustice from the permission to pay in bonds is strained and fails to satisfy its plain language. It wholly overlooks the plain purpose of the clause so manifest in the recital at its beginning to save Compton from the very great hardships of a sale before his interest was judicially ascertained. The clause was a reservation of Compton's lien from the sale, and a retention of it on the property sold. The deed directed to be made by the masters conveyed all the title to the described railroad of all the parties to the suit "except as particularly reserved in and by said decree of foreclosure and sale."

Thus far in this opinion I have been expressing the views of the entire court. We are agreed that the saving clause of the decree secured to Compton the same right to enforce his lien as if he had not been a party to the proceedings. Judge Lurton and I are not able to agree upon the remedy which this construction of the saving clause of the decree should secure to Compton. Judge Ricks thinks that the questions upon which Judge Lurton and I differ are of sufficient importance and difficulty to require that they shall be certified to the Supreme Court, and therefore expresses no opinion upon them. In this conclusion, the differing judges concur and the questions will be certified. As it may be of some assistance to the Supreme Court to know the grounds of our difference, I now proceed to state my own views.

How may Compton enforce his lien in the court below? By resale of the Ohio division or by redemption of it or by a redemption of the railroad from Toledo to the Illinois line as decreed by the court below? These questions must be considered in three aspects. First, with respect to the rights of those who were parties to the Ohio decree and second with respect to the rights of the Ohio divisional mortgagees and third with respect to the rights of the Indiana divisional mortgagees. By virtue of the sale the assignee of the purchaser the Wabash Railroad Company acquired the rights of the Wabash, St Louis & Pacific R. R. Co. and the mortgage rights of all the mortgagees whose mortgages were foreclosed in the court below. And it may be conceded that the questions above suggested are to be treated exactly as if the parties were present in this cause because the purchaser may assert the right of each.

As against those who were parties to the Ohio decree Compton had the right to a sale of the Ohio property subject to the Ohio divisional mortgages. This was the relief accorded to him by the Ohio decree. I do not think they can be heard to object after that

decree to Compton's working out his remedies against the Ohio division. It is pressed upon us that to allow Compton to
37 divide up the railroad against which he has an indivisible lien is most inequitable and that no court of equity should lend its aid to accomplish such a result. The power of this court to withhold such relief though secured by the Ohio decree is asserted on the principle laid down in Lawrence Mfg. Co. *vs.* Janesville Mills, 138 U. S. 564, that where the aid of a court of equity is invoked to enforce or "piece out" (as the phrase is) an incomplete decree of another or the same court, the court appealed to may examine the justice of the decree sought to be enforced and refuse its aid if it finds the decree inequitable, or may impose as a condition of its granting relief any variation or limitation with respect to the operation of the decree which justice and equity may require. The decision in the case cited seems to be rested chiefly on the fact that the previous decree therein sought to be enforced was a decree entered by consent of parties and not by the adjudication of a court. But conceding the soundness of the general principle, it has application only to bills in equity to carry a former decree into execution where no ordinary process on such former decree will serve, because of the neglect of the parties to proceed on the decree promptly and the embarrassment of their rights caused by subsequent events. Daniel's Chancery Practice, 1585 (4th ed.). It is only the defendant in the new suit who can call the former decree in question; the plaintiff never can. 2 Daniel's Ch. Pr. 1586; Robinson *vs.* Robinson, 2 Ves. 225. The court exercises the power because the plaintiff is voluntarily seeking aid for a decree and so it may impose its own conditions in granting it. But such a doctrine, it seems to me, has no application to a case like that of Compton who was brought into the court below against his will and compelled to set up his lien, and required to work out his rights in this jurisdiction on penalty of losing them. Under such circumstances, he is certainly entitled to rely on the full measure of his rights as then defined and adjudged by the decree of a court, in enforcing which he did not voluntarily seek the court below to aid him, and which he would not have set up in the court below until required to do so on pain of forfeiting every benefit it secured him. Added to this, the mode by which the court below acquired jurisdiction of Compton and his claim suggest- reasons of peculiar force for not abridging in the slightest degree the rights adjudged to be his in the Ohio decree. The jurisdiction, as already explained, is ancillary and unusual. It rests first on the necessity for avoiding conflicts between courts for possession and control of property and second on the duty of courts to prevent an abuse of their process. When jurisdiction is thus assumed by Federal courts over controversies usually cognizable in State courts, there is a heavy obligation on the Federal Courts to secure to those thus deprived of the privilege of resorting to their ordinary State tribunals, as near the same relief or remedy as they would have received in the State courts, as circumstances permit. A striking recognition of this obligation by the Supreme Court of the United States

may be found in the case of Gumbel *vs.* Pitkin, 124
38 U. S. 132, the opinion in which by Justice Mathews, has already been quoted from. It would be strange indeed if a jurisdiction asserted only because of the necessity of the case and under extraordinary circumstances, could be used to bring in direct review before a circuit court of the United States a decree of the supreme court of a State. Had Compton never been made a party to the action below, he might have proceeded with execution of his decree, and bought in the interests of the parties to his action in the Ohio division. He could not have taken possession of the property because it was in the possession of the court below, but having executed his decree in this wise, he might have then been made a party to the action below, or could have brought an independent action to redeem from the purchaser. In such a case certainly the other parties to his Ohio decree could not be heard to object to his enforcing a remedy against the Ohio division alone. It is difficult to see why the execution of a decree fixing the rights of the parties should work any more of an estoppel than the decree itself.

It is next objected that the Ohio decree is not binding on the parties to it with reference to the appropriation of the Ohio division to the payment of the equipment bonds because in this respect the decree was not responsive to the issue raised between the parties. It is true that a decree or judgment is only *res judicata* in so far as it is responsive to the issues tendered by the pleadings or to the matters which by the record appear to have been actually controverted. Reynolds *vs.* Stockton, 140 U. S. 254. The Ohio decree is not open to this objection. The question at issue between the parties to the decree in the supreme court of Ohio was first whether Compton had a lien upon the property of the Toledo & Wabash R. R. Co. reaching from Toledo to the Illinois State line and secondly how it could be enforced. The supreme court held that he had such a lien and directed the Ohio property to be sold for its enforcement. The prayer of Compton was for the enforcement of his lien by the sale of the whole railroad. If he asked for a sale of the whole property, the court had the right to enforce in his favor that remedy or any remedy less than that which it thought just and proper. It was therefore within its jurisdiction as invoked by Compton's prayer to take so much of the property on which it declared the lien to exist as in equity it thought it had the right to take. It took that over which it had territorial jurisdiction. See opinion of court in 45 O. S. 592, 623. Whether it erred in this, neither the court below nor this court is vested with the power to decide. It is true that the record does not show that any formal issue was made with reference to the amount of property to be sold to pay the lien, but this can make no difference. The court was bound before it made an operative decree to specify the property to be sold to pay the lien (Railroad Co. *vs.* Swasey, 23 Wall. 405) and it was plainly within its power to subject less than that prayed for by the plaintiff to such a sale. The parties were present in court

and might have objected to this form of remedy. Whether
39 they did so or not, the granting of the remedy being within the prayer of Compton was a binding and conclusive adjudication upon the parties in court that such a remedy was proper. This is identically the same issue and cause of action which was in the supreme court of Ohio and therefore no objection can be made or entertained by the court below or by this court to the form of relief there granted which was or might have been made in the court entering the decree.

In Cromwell *vs.* The County of Sac, 94 U. S. 351, Mr. Justice Field used this language:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed."

The same principal is laid down in many cases. Stout *vs.* Lye, 103 U. S. 66; Dimock *vs.* Revere Copper Co., 117 U. S. 559.

It is further suggested that the order of sale against the Ohio property was mere process to carry out the decree and was not an adjudication which when the decree is pleaded in another court can be used to secure the same remedy afforded in the Ohio court. Such a contention is untenable. The decree for sale was the operative part. It was the court's act. All previous to that was mere declaration or finding upon which the justice of the court's act was founded. It was within the power of the court to compel a sale of the entire line affected by the lien. So far as the Indiana property was concerned, it might have enforced a sale by compelling the defendant company to convey to the purchaser at its judicial sale. Instead of doing this, it ordered a sale of the Ohio property alone. This required judicial action. In Hill *vs.* Bank, 97 U. S., 450, a trustee under a power of sale sold real estate separate from water power and paper-mill machinery. A bill was filed by the
40 debtor to set the sale aside. This was done on the ground that the realty, the water power and paper-mill machinery,

should be sold as an entirety and the sale was set aside. Thereupon a bill was filed against the debtor to enforce the payment of the amount in default and the court below directed that the property should be sold as an entirety. In the supreme court error was assigned that the court sold as an entirety and it was held that the error could not be sustained because the point was res adjudicata. Said the court:

"The decree upon the points in issue, and decided, is as binding upon the parties as a judgment or decree would be in any other case."

It is manifest from this case that the question how large a part of the property involved shall be sold to pay a lien is as clearly the subject of res judicata as the decision of any other right. The amount of the property to be sold under a decree in equity is one of the essential adjudications of the court and is conclusive on the parties. In Railroad Company *vs.* Swasey, 23 Wall. 405, the question was whether a decree was final or not so as to permit an appeal. The action was to subject stock pledged to secure bonds to the payment of unpaid interest and the court entered the decree appealed from declaring that the stock must be sold for the purpose and referring to a master the question what proportion of the stock was equitably applicable. Chief Justice Waite said (page 309):

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. The sale is the execution of the decree. By means of it, the rights of the parties as settled, are enforced. But to justify such a sale, without consent, the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Until this is done, the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

In Winter *vs.* Eckert, 93 New York, 367, in a suit to settle up a partnership a judgment had been entered directing the sale of partnership property consisting of the stock and good will of a brewery business, horses and wagons, etc., by public auction at public auction-rooms. The sale was made in accordance with the judgment and the sale was confirmed. The order confirming the sale was
41 appealed from but not the judgment ordering it. In affirming the action of the court below, the court of appeals rested its decision on the binding effect of the provisions of the judgment with reference to the mode of conducting the sale. Ruger, Ch. J., said: "This judgment remains in full force as a binding adjudica-

tion upon all parties to the action, and conclusively determines as between them, not only the necessity and propriety of, but the place and manner of a sale of the property, including the conjunctive sale of the real and personal property therein described at a place where the presence of the personal property on such sale was entirely impracticable."

It therefore follows that as against the Wabash, St. Louis & Pacific Ry. Co., the defendant company below, the successor in title of the mortgagors in the various mortgages foreclosed below, as well as against Humphreys & Lindley, trustees, and Knox & Jesup, trustees, and all other mortgagees whose liens are junior to that of Compton, the decree of the Ohio supreme court establishes conclusively that Compton has a lien on the railroad of the Toledo & Wabash Railway Company which may be enforced against the Ohio division alone without regard to his remedy against the Indiana division.

But it is said that under the present circumstances a sale subject to the divisional mortgages is impossible and that any relief which is granted must include a disposition of Compton's rights with reference to those mortgages. This may be true, but it does not destroy the force and effect of the judicial determination that so far as the parties to the Ohio decree were concerned Compton has the right to enforce his remedy by sale or redemption against the Ohio division. The decree for sale of the Ohio division subject to the divisional mortgagees necessarily carried with it so far at least as the parties to the suit were concerned the right on Compton's part or on the part of the purchaser at such a sale to redeem the divisional mortgages. They, in any event, cannot be heard to urge that Compton should be compelled in the enforcement of his lien either by sale or redemption, to resort to the entire line.

It remains to consider therefore whether a resale can be decreed as against the Ohio divisional mortgagees. They were not parties to the Ohio decree and are therefore not bound by it. The ordinary equitable rule is that the junior mortgagee cannot compel the sale of the premises free from the lien of the senior mortgage against the consent of the senior mortgagee, but that his only remedy is to redeem the senior mortgage.

It has been urged upon us however that in Ohio by statute and decision, it has become a rule of property that a junior mortgagee of real estate need not redeem a senior mortgage but may bring an action for foreclosure, make the senior mortgagee party, sell the premises free of all liens and compel the senior mortgagee to look to the proceeds of sale for the payment of his debt. Stewart *vs.* Johnston, 30 O. S., 24. Section 5316 Revised Statutes of Ohio.

42 Even if we concede that this rule has application to the foreclosure of railroads, and to liens other than mortgages, though the statute in terms applies to mortgages on real estate only, nevertheless we think that the peculiar circumstances of this case require that we shall not order a resale.

Compton's lien as it was decreed by the supreme court of Ohio arose from the merger by consolidation of the Toledo & Wabash

Railway Company in the Toledo, Wabash & Western Railway Company. The same Ohio decree declared a lien in favor of the holders of all the remaining equipment bonds not held by Compton, and the same reasoning would establish a lien in favor of every unpaid creditor of the constituent railroad company. These liens are of equal priority with Compton's and depend on the same act of the original creditor. They can be equitably satisfied only by dividing the benefit of the security ratably between them. Justice both to others interested in the property and to the co-lienholders themselves would seem to require that all the co-lienholders should be parties to an action to enforce the lien of any one of them, and that the decree should provide proper relief for all of them. The relation between the lien of Compton and that of the other bondholders and creditors of the Toledo & Wabash Railroad Company is not very different from that between those of the bondholders in the case of the Trustees of the Wabash & Erie Canal Company *vs.* Beers, 2 Black 448, or that between the liens of the creditors of the insolvent corporations in Sawyer *vs.* Hoag, 17 Wall. 610, 622; Paterson *vs.* Lynde, 106 U. S. 519, and Johnston *vs.* Waters, 111 U. S. 640, 644, and in all those cases, a suit for the benefit of the whole class of creditors was held to be necessary. See Handley *vs.* Stutz, 137 U. S., 366, 369. Now it is true that Compton's decree in the Ohio supreme court estops the parties to it from objecting to the relief which that decree gives him on the ground that he should have brought his suit as a class suit and joined all his co-lienholders, but the Ohio divisional mortgagees were not parties to that decree. They may, therefore, properly be heard to object to a resale of the Ohio division at their risk, if on equitable grounds, it should not be permitted.

From the cases cited above, I feel convinced that even if the Ohio statute would otherwise apply, the relation of Compton's lien to those of his co-lienholders is such that a foreclosure and sale should not be had except in a suit for the benefit of all, and that the prior mortgagees have a direct interest and right to make this objection. If a sale is ordered on Compton's lien without the presence of the other co-lienholders, then the title to be conveyed to the purchaser must be subject to their liens of uncertain amount. This fact will, of course, impede the sale and reduce the price bid. It was Compton's duty to have brought either a representative suit or to have made his co-lienholders parties, if he wished a sale free from all liens. He did neither. It would be unjust to the assignee of the prior mortgages to send the case back for the purpose of bringing in other parties or to permit Compton to change the form of his
43 pleadings, when we can give him by redemption all the relief that he can equitably ask in the absence of his co-lienholders.

Not being in a position where he can ask a foreclosure and sale against the mortgagees, we may, if Compton states a case for it, treat his prayer for general relief as a prayer for a decree for redemption. Hudnut *vs.* Nash, 16 N. J. Eq. 550. It is well settled that the tenant in common of an equity of redemption has the right to redeem the mortgage to protect his own interest by paying the

full amount due thereon. 1 Jones on Mortgages, sec. 1063 and cases cited. Either before or after thus redeeming the entire mortgage, he may call on his cotenants to contribute to the expenses of redemption and on their failure to do so he may foreclose and bar their liens. Young *vs.* Williams, 17 Conn. 393; Seymour *vs.* Davis, 35 Conn. 264; McLaughlin *vs.* Curtis, 27 Wisc. 64; Crafts *vs.* Crafts, 13 Gray 260.

Though for the reasons given, I do not think Compton may have a resale of the Ohio division, it seems clear to me that he may redeem it by paying to the purchaser, the Wabash Railroad Company, the amount due on the Ohio divisional mortgages. As against all the parties to his Ohio suit, he may exercise this right because it was incident to the relief granted in the Ohio decree, to wit, the sale of the Ohio division subject to those mortgages. This prevents objection from the purchaser as assignee of the rights either of the defendant corporation The Wabash, St. Louis & Pacific Railway Company, or of all the mortgagees with liens junior to Compton's or of the Wabash Railway Company and the Toledo, Wabash & Western Railroad Company, predecessors in title of the defendant, for these were all parties to the Ohio decree. As the assignee of the rights of what party to the cause below, can the purchaser object to the redemption of the Ohio division and mortgages? Have the Ohio mortgagees a right to object? It is difficult to see how they can complain if their debts are paid in full, as they must be if Compton shall redeem. All that they can require before submitting to redemption is that Compton shall have acquired an interest in the equity of redemption. The owner of the equity when this suit was brought, was the Wabash, St. Louis & Pacific Railway Company. The Ohio decree established that, as against that company, Compton had obtained an interest in the equity from the Toledo & Wabash Railway Company, one of its predecessors in title, and the immediate grantee of the mortgagor Ohio companies. The Ohio mortgagees cannot dispute this transfer of an interest in the equity of redemption to Compton. When a mortgage is given, the mortgagor does not thereby restrict his right to convey or incumber the equity of redemption in him. 1 Jones on Mortgages, 676; Hodson *vs.* Freat, 7 Wis., 263; Flanagan *vs.* Westcott, 11 N. J. Eq., 264. It, therefore, follows that conveyances or decrees binding upon the original mortgagor or his privies with reference to the ownership of the equity of redemption or an interest in it, are with reference to the mortgagee *res inter alios acta*, which he has no right or concern to impeach or dispute.

44 Barney *vs.* Patterson, 6 Harr. & J., 182, 203; Gregges *vs.* Forsyth, 24 How., 179; Secrist *vs.* Green, 3 Wall., 744; Baylor's lessee *vs.* Dyarnette, 13 Gratt., 152; Taylor & McNeal *vs.* Phelps, 1 Harr. & G., 492, 503. Other illustrations of the same principle may be found in Candee *vs.* Lord, 2 N. Y., 269; Raymond *vs.* Richmond, 78 N. Y., 351; Pray *vs.* Hegeman, 98 N. Y., 351; Curtis *vs.* Leavitt, 15 N. Y., 51; Hall *vs.* Stryker, 27 N. Y., 596; Way *vs.* Lewis, 115 Mass., 26; Surhart *vs.* Spaner, 24 Ohio St., 432; Wrugate *vs.* Haywood, 40 N. H., 437; Inman *vs.* Mead,

97 Mass., 310; Brigham *vs.* Fayerweather, 140 Mass., 411, 413; Cincinnati *vs.* Dickmeier, 31 O. S., 242.

In other words, if the mortgagor railroad company had the right itself at the time the lien of the equipment bondholders attached to its property, to redeem the Ohio divisional mortgages without redeeming the Indiana mortgages, it had the right to convey it to some one else, and whether by the act of issuing the bonds and the consolidation, it did convey such right to the equipment bondholders is a question to be settled between the mortgagor railroad company and its successor in title on the one hand and the equipment bondholders on the other, without regard to the wish or consent of the prior mortgagees. The Ohio decree is a conclusive settlement of the question and cannot be disturbed or attacked by the divisional mortgagees.

It is strongly urged against the views that the Ohio mortgagees mays not object to a redemption of their mortgages alone, that the mortgagees in the Indiana divisional mortgages are the same as in the Ohio divisional mortgages, namely the Farmers' Loan & Trust Company in the first two divisional mortgages and E. D. Morgan in the second two, and that it is a general equitable principle that where two mortgages in default are held by the same party as mortgagee or assignee, equity will not decree redemption of one unless it be accompanied by redemption of the other on the same piece of property. I think that this principle no longer obtains in this country, that it is in its last analysis the basis for the English doctrine of tacking mortgages which has been pronounced to be harsh and unsuited to our jurisprudence. But I do not find it necessary to discuss the question whether this rule is sound or not, because in my view it has no application whatever to the case at bar. It is true that the Farmers' Loan & Trust Company is the trustee in an Ohio divisional mortgage and is also a trustee in an Indiana divisional mortgage, but it is not true that the mortgagee in those mortgages is the same. The Farmers' Loan & Trust Company in each mortgage is trustee for certain bondholders, but there is no evidence whatever to show that the bondholders under one mortgage are the same as the bondholders under the other. Therefore, the real parties in interest in the two mortgages are not the same and therefore, even the strict and inequitable rule with reference to tacking mort-
gages in England would not apply to such a case. E. D.
45 Morgan as trustee for one set of bondholders has no power to assert the rights of other bondholders for whom in another mortgage he is also acting as trustee. It is not a union of the two securities and the two titles in the same person. John Smith as trustee for John Jones is not the same person in law as John Smith the trustee for John Robinson. The title conferred by the mortgage is held in two different capacities. The rights of the one cannot be made to enure to the other. It therefore follows that this case is to be treated exactly as if the mortgagees in both the Indiana divisional mortgages were different from those named in the Ohio mortgages.

A second ground most forcibly stated for denying the right of

Compton to redeem the Ohio divisional mortgages without also redeeming the Indiana mortgages is based on a theory of suretyship. It is said that each company which acquired title to the road by assuming the mortgage obligations became with reference to the debt under the divisional mortgages, the principal debtor and there being no novation of the debts, the grantor corporation remained bound as surety, that the succeeding corporation having promised to pay all the mortgages as the consideration for the purchase, the grantor corporation had the right to object to a partial discharge of this obligation and to insist as surety, that, after default, the right of redemption could not be exercised except by a redemption of all the mortgages, payment of which in a single promise had been assumed as a consideration for the purchase. In this wise it is said the Ohio divisional mortgages and the Indiana divisional mortgages were so united by successive assumptions of the obligations declared on them, that now a redemption of the former without the latter cannot be permitted.

There are several reasons why the principle relied on, even if it be a sound one, has in my opinion, no application to the case at bar. In the first place the objection, if otherwise tenable, could only be made by one of the surety corporations. Of these, the Toledo, Wabash & Western Railway Company and the Wabash Railway Company were parties to Compton's Ohio decree, and this, for reasons already given, prevents them from objecting to his enforcing his lien against the Ohio division alone. Again, neither of them nor the Toledo & Wabash Railway Co. the first consolidated company is a party to this action and it is difficult to see how the objecting purchaser who never acquired anything but the rights of The Wabash, St. Louis & Pacific R'y Co., the defendant company below, can use the surety rights of predecessors in title to the Wabash, St. Louis & Pacific Railway Co. which that company never acquired and could never assert.

But let us suppose that the Toledo & Wabash R'y Co. were a party objecting. Even by it the objection suggested could not be made. It was the first corporation which united the Ohio and Indiana roads. That was the consolidation of the Toledo & Wabash R. R. Co. of Ohio and the Wabash & Western R'y Co. of Indiana. At the time of the consolidation the two Ohio divisional mort-
46 gages were the obligation of the Toledo & Wabash R. R. Co. of Ohio, while the Indiana divisional mortgages were the obligation of the Wabash & Western R. R. Co. of Indiana. The consideration for the consolidation was a guaranty made by the Toledo & Wabash R'y Co. to the Toledo & Wabash R. R. Co. that it would pay the Ohio divisional mortgages and another guaranty by the same consolidated company moving to the Wabash & Western R'y Co. that it would pay the Indiana divisional mortgages. The promises in these two guaranties were different and it therefore of course was within the power of the Toledo & Wabash R'y Co. the consolidated corporation to fulfill its promise to its Ohio constituent by redeeming the Ohio divisional mortgages without regard to the Indiana divisional mortgages. The Toledo & Wabash

R'y Co. had made no promise to its Indiana constituent that it would pay the Ohio divisional mortgages and therefore the Indiana constituent had no right to object to a redemption of the one without the other. The Ohio constituent was not a surety for the payment of the Indiana divisional mortgages nor was the Indiana constituent a surety for the payment of the Ohio divisional mortgages. It seems to me clearly to follow therefore that the Toledo and Wabash R'y Co. had the right in equity to redeem the Ohio divisional mortgages without redemption of the Indiana divisional mortgages because by no single promise of it to the same promisee had it united its obligations to pay the four divisional mortgages.

One of the authorities relied on to support this suretyship argument is Wells *vs.* Tucker, 57 Vermont, 223. The case is not very well reported but so far as its facts are stated, it appears to have been an action by the successor in title of the purchaser of a farm to redeem the same from a mortgage on an undivided one-half of the farm without redeeming a mortgage on the other half. The purchaser had stipulated as part of the purchase price to pay both mortgages. The vendor was a party to the action to redeem, and he objected to the redemption of one mortgage without the other. It was held that as to the vendor the agreement by the vendee to pay both mortgages to relieve the vendor from liability was single and indivisible and that, in his position, as surety for the payment of both mortgages the vendor could insist that both should be discharged at the same time. Whether this case can be supported or not, its *ratio decidendi* has no application to the question whether the Toledo and Wabash R'y Co. the first consolidated company could redeem the mortgages on the Ohio division without redeeming those on the Indiana division because there were two different vendors and the assumption of the Ohio mortgages was a promise made to one of them, and that of the Indiana mortgages was a different promise made to the other. There was therefore no person to whom a single promise was made involving the assumption of the entire debt under the four mortgages. The mortgages continued to be liens on that division which by their terms they respectively covered and the agreements to assume were made to the two constituents respectively and separately and not to
47 them jointly and unitedly.

If the Toledo & Wabash R'y Co. had the right therefore to redeem the Ohio divisional mortgages separately from the Indiana divisional mortgages without the violation of any promise made to its constituent companies, then it certainly had the right to transfer these separate equities of redemption in the two divisions to whomsoever it might choose. 1 Jones on Mortgages, 676; Hodson *vs.* Treat, 7 Wisc. 263; Flanagan *vs.* Westcote, 11 N. J. Eq. 264.

The equipment bonds were issued by the Toledo and Wabash Railway Company. By reason of its act in transferring all its assets to the Toledo, Wabash and Western railway, and the effect of Ohio statute of consolidation, the debt created by the equipment bonds became a lien on the separate equities of redemption which

the Toledo & Wabash Railway Company held under the Ohio and Indiana divisional mortgages.

It is true that the Toledo, Wabash & Western R'y Co. made a single promise in the agreement of consolidation to pay all the indebtedness owing by the Toledo & Wabash R'y Co. and this included the two Indiana divisional mortgages, the two Ohio divisional mortgages and the equipment bonds as well as all other debts which the Toledo, Wabash & — R'y Co. had not paid, but it was not by virtue of this promise that a lien passed to the equipment bondholders. It was by virtue of the act of the Toledo & Wabash R'y Co. in transferring all its assets to the consolidated company and the lien arose by that act without regard to the promise which the new consolidated company made as the basis of the new consolidation. The equities of redemption upon which the equipment bondholders obtained their lien were the separable equities of redemption owned by the Toledo & Wabash R'y Co., and not the united or single equity of redemption which the Toledo, Wabash & Western R'y Co. acquired by virtue of the consolidation.

All the consolidated corporations from the Toledo, Wabash & Western R'y Co. down to the defendant below in the Wabash, St. Louis & Pacific R'y Co. were parties to the Ohio decree. That decree settled the right of Compton to resort for the satisfaction of his lien to the Ohio division alone. Incident to that remedy and relief and necessary to it followed the right to redeem the Ohio divisional mortgages and no party to the Ohio decree can now be heard to object to the enjoyment of that remedy by Compton.

But it is said that the same theory upon which a lien attached in favor of the equipment bonds held by Compton secured to the Indiana divisional bondholders a similar lien on the entire property of the Toledo & Wabash R'y Co., the constituent of the Toledo, Wabash & Western R'y Co., and therefore that the Indiana mortgagees have the right to object to a division of their security which covers the entire road. There are several reasons why this objection is untenable.

First. It was not by virtue of the sale in the court below
48 that the purchaser became the equitable assignee of the rights of the Indiana bondholders under their mortgage and otherwise and, therefore, he cannot represent them on this appeal. n the suit in the court below, the Farmers' Trust Company and James F. Joy were parties in a trust capacity representing not the Indiana bondholders but the bondholders under the Ohio mortgages. Under the averments of the bills and cross-bills, they were not proper parties to the Ohio suit because by virtue of the mortgages, they had no interest in the Ohio property. It is true that by an error of his counsel in the court below, Joy filed in the court below the same answer as he did in the Indiana suit for the Indiana bondholders, but the error was a palpable one, and the subsequent act of the court as well as the averments of the bills by which he was made a party below, show that he was only a party as trustee for the Ohio bondholders. It is true that an omnibus decree in the same languag, was entered in each of the three Federal courts of northern Ohio

Indiana and southern Illinois, but it was only operative in each court to foreclose and adjudicate liens on the property of the defendant company within the territorial jurisdiction of that court. No attempt was made by decree to compel conveyances from the mortgagor company to the purchaser of property lying outside the territorial jurisdiction of the court. That a court has the power when it has personal jurisdiction over the mortgagor to foreclose the mortgage on property lying outside of its territorial jurisdiction is plain and is fully established by the case of Muller *vs.* Dows, 94 U. S., but it must exercise this power by a decree against the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative. Carpenter *vs.* Strange, 141 U. S. 87, 106. No such decree was made by the court below, and no such relief was prayed by the parties. By the decree in each court and the deed of the masters made in pursuance thereof the purchaser took title to the part of the railroad in the territorial jurisdiction of that court. It is of course convenient to have foreclosure suits which involve a railroad traversing three States proceed together, and the different courts may make their decrees similar and order a joint sale, but the suits are separate suits and effect different pieces of property, and the parties to one suit do not *ipso facto* become parties to the other two. Mercantile Trust Company *vs.* Kanawha & Ohio R'y Co., 39 Fed. Rep., 337; Toland *vs.* Sprague, 12 Peters, 300, 327; Northern Indiana R. R. Co. *vs.* Michigan Central Railroad Company, 15 How., 233, 242. Distributing therefore so much of the decree for sale as it appears in the record to each of the circuit courts where it belongs and is operative, it may properly be said that the mortgagees under the Indiana divisional mortgages were not parties to this suit in the court below and are not parties to this appeal. Now the purchaser at a judicial sale becomes a party to the record for certain purposes and he may appeal from a decree of the court below affecting his interests as purchaser but he cannot dispute the correctness of the decree of sale under which he bought. That binds him conclusively. Blossom *vs.*
49 R. R. Co., 1 Wall., 655; Central Trust Company *vs.* Locomotive Works, 135 U. S., 207; Kneeland *vs.* The American Loan Company, 136 U. S., 89; Swann *vs.* Wright's Executors, 110 U. S., 590; Swann *vs.* Clark, 110 U. S., 602. The only ground for giving him the position of a party is that he may protect his rights as a purchaser by the decree. If the Indiana mortgagees were not parties to the suit in the court below, it is perfectly obvious that the purchaser under the decree for sale and its confirmation acquired nothing of their rights as mortgagees or otherwise. Therefore, he cannot be heard to assert those rights on this appeal. It is wholly immaterial that in another suit in another court in another jurisdiction he has become the owner or equitable assignee of those Indiana mortgages. In his capacity as purchaser and quasi-party in this suit, and on this appeal he cannot be permitted to assert any rights under them.

Second. But suppose that it be admitted that the Indiana mortgagees were parties to the suit in the court below and that the de-

cree for sale did operate to foreclose their mortgages so that the purchaser became by the sale the equitable assignee of those mortgages, it still does not follow, that the purchaser may assert a different lien from that secured by the mortgage, and arising from an entirely different state of facts extraneous to the mortgage. The purchaser at the sale below became the equitable assignee of every mortgage or other lien set up and foreclosed by the decree for sale. Brobst *vs.* Brock, 10 Wall., 519; Childs *vs.* Childs, 10 O. S., 339; Stark *vs.* Brown, 12 Wisc., 638, 652; Johnson *vs.* Sandhoff, 30 Minn., 197; Brewer *vs.* Nash, 16 R. I., 462. The rule is generally applied in cases where for some reason the sale is ineffective to carry the whole title to the property. The reason for it is best explained by the supreme court of Rhode Island in the opinion in the case last above cited where after a reference to all the authorities, the court says:

"The grounds of decision are not very fully developed in these cases, but it seems to us that the true ground is this, that while ordinarily a stranger to the estate who voluntarily pays off a mortgage thereon is not entitled to subrogation to the rights of the mortgagee, a purchaser at the mortgagee's sale, even when the sale is void, is not to be regarded as a mere stranger; but that having bid off the estate in good faith on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title he pays the amount of his bid and the same is applied to the mortgage debt he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence. In such a case, the court does simply what the mortgagee would be bound to do himself, if he could, when it treats the purchaser as the assignee of the mortgagee."

The sole basis for giving effect to such an equitable assignment of liens in favor of a purchaser disappears in a case where a
50 lien, though it exists in favor of a party, is neither set up in the pleadings or by the terms of the decree foreclosed. Of course the purchase-money paid could not be applied to the payment of such a lien, and in no way could the assignment by estoppel be worked out. It is true that if a party defendant after being required by prayer of complainant to set up such lien as he claimed failed to do so, he might be thereafter barred from ever again seeking to enforce it (Hefner *vs.* Insurance Company, 123 U. S., 747) but this is quite a different result from a transfer to the purchaser of a right to assert affirmatively such a lien against a third person not a party to the suit. In the one case, the lienholder waives his lien; in the other, when he claims part of the purchase-money he enforces it. The waiver is not more to the advantage of the purchaser than of every one else interested in the property. By sharing or claiming a share in the proceeds of sale, he does that which ought in equity to work an assignment of his lien to the purchaser who pays the purchase price. In the case at bar the mortgages of the Indiana mortgagees of course passed by equitable assignment in the Indiana suit to the purchaser because they were

there set up and foreclosed, and the purchase-money was distributed to both of them. But those mortgagees never set up any lien on the Ohio property by virtue of the consolidation. If they had any such lien, they waived it, and the lien is as if it never was. The waiver is as much in Compton's behalf as in that of the purchaser. It is too late therefore for either the purchaser of the Indiana mortgagees, if they are to be considered parties to this appeal, to base on such a lien an objection to Compton's remedy against the Ohio division for the enforcement of his lien.

Third. But even if the Indiana mortgagees were present at the bar, they could present no valid objection to Compton's redemption of the Ohio division. As already explained, the lien which enured to them and to Compton by the merger of the Toledo and Wabash Railway Company in the Toledo, Wabash & Western R. R. Co. was a lien on the separate and separable equities of redemption held by that company, and as it might have separately redeemed, so might they or either of them redeem for the benefit of themselves and others similarly situated.

Fourth. The Indiana mortgagees have a mortgage lien on the Indiana division which they do not waive, but have enforced and propose to use as a defence against all comers. This is prior to their lien for the same debt on the Ohio and Indiana divisions, we are now considering. If the Indiana division should sell for enough to pay the mortgage debt, then they could have no subsequent interest in how Compton should enforce his lien. If it should not, and there should be a deficiency, then there would be nothing left out of which to enforce their junior lien for the deficiency, except the Ohio division. How can they then object to Compton's resort to the Ohio division to enforce his lien, when that is all they propose to leave him by foreclosing their prior mortgage on the Indiana division. Surely they cannot prevent Compton
51 from taking the only part left of the common security which they themselves divide, by appropriation of the other part under a prior mortgage.

For these reasons I think the suggestion that the Indiana mortgagees or their alleged assignee, the purchaser, may object to this redemption without including the Indiana mortgages has no weight. In my opinion, the decree of the court below should be modified so as to secure to Compton the right to redeem the Ohio division alone from the purchaser of the Wabash Railroad Company by paying to it the amount due on the two Ohio divisional mortgages.

Finally it is insisted that it is in conflict with public policy to permit a redemption of part of a consolidated and continuous line of railway. The decree of the court below permitted such a redemption for the consolidated railway extended from Toledo to St. Louis, and redemption was decreed of the road from Toledo to the Illinois State line. But it is said that this was because there was a separate lien on the road from Toledo to the Illinois line. That is true and the same thing is true here. The divisional mortgages divide the line by reason of their terms and every succeeding company which embraced the Ohio division in its

line took subject to those mortgages. The only company which had any interest in the continuity of the line upon which an objection to a redemption of part could be based was the Wabash, St. Louis & Pacific Railway Company and it is prevented from urging such an objection by the Ohio decree. Clearly the divisional mortgagees whose rights depend on the very division of which complaint is made, and who are to be paid in full have no interest to preserve the continuity of the line. The decree of sale below provided for a separate sale of the Ohio division, and had Compton been assured of the validity of his lien as it was subsequently declared and the decree had contained no saving clause, he could certainly have bid in the Ohio division alone, by offering a sum exceeding the amount of the Ohio divisional mortgages. Why, then, can he now be prevented from doing what is substantially the equivalent of such a purchase?

It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course the mortgagees are entitled to the principal of their mortgages with interest to the time of tender, but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, *i. e.*, the Ohio division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay—no more, no less. It is the general rule that a mortgagee in possession when his mortgage is redeemed must account for the rents and profits during his tenancy. Russell *vs.* Southard, 12 How. 138, 155.

52 The Wabash Railroad Company as the successor in title of the purchasers at the sale is to be regarded as the first Ohio mortgagee in possession and therefore, liable to account for the rents and profits or net earnings of the mortgaged property in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior encumbrancer with respect to a sale in a foreclosure proceeding brought by a senior mortgagee to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior encumbrancer, the assignee of a mortgage in possession and therefore liable to account for the rents and profits. Jones on Mortgages, (5th ed.) section 1395; 2 Hilliard on Mortgages, 158; Vanderkemp *vs.* Shelton, 11 Paige 28; Welsh *vs.* Rutgers Fire Ins. Co., 13 Abb. Pr. 33; Van Dugne *vs.* Shann, 39 N. J. Eq. 6; Bunce *vs.* West, 62 Iowa 80; Spurgin *vs.* Adamson, 62 Iowa 661; Ten Eyck *vs.* Casad, 15 Iowa 524; Murdock *vs.* Ford, 17 Ind. 52. In two cases a different view has been taken. Catterlin *vs.* Armstrong, 79 Ind. 514 and Renard *vs.* Brown, 7 Nebraska 449; 2 Jones on Mortgages, (5th ed.) section 1118*a*. The theory upon which the last-mentioned cases go is that by the defective sale not only the mortgage passed to the purchaser by assignment but also the equity of redemption, and the purchaser

must be presumed to be holding the property as owner of the equity rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property, (Gray *vs.* Nelson, 77 Iowa 63,) but where as in the case at bar the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain against a junior encumbrancer seeking to redeem that he is receiving the rents and profits as the owner of the equity rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior encumbrancer to a first lien. When the sale in this case took place the mortgaged property was in the hands of receivers, that is the mortgagees were in possession, and the rents and profits were applicable to the mortgages in the order of their priority. Howell *vs.* Ripley, 10 Paige 43; Millenberger *vs.* Logansport R'y Company, 106 U. S. 286. If as to Compton the sale merely operated as an assignment of the various interests of the parties, the purchaser as the assignee of the prior mortgages in possession would seem to have derived his possession and to maintain it through the mortgagees rather than from the owner of the equity of redemption. For these reasons I think that Compton is entitled to an account of the net earnings of the Ohio division of the Wabash Railroad Company over and above all operating expenses including reasonable and necessary repairs and that this sum should be deducted from the principal and interest due on the two mortgages. Of course the railroad company is entitled to credit for all taxes paid by it and for the cash advanced by it in lieu of the bonds under the first mortgages to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages.

53

The last point to be noticed in this long discussion of a troublesome and complicated case is that presented by the motion to dismiss on the ground that the same decree as that appealed from was entered in Indiana and was not appealed from. This is said to estop appellant from proceeding here. The question in the Indiana case was what remedy Compton could have for the enforcement of his lien against the Indiana property, not the lien against the Ohio property. The prayer in the Indiana court was confined to Indiana property as the prayer in the Ohio court was confined to Ohio property. Obviously the question whether under that decree Compton could appropriate the Ohio division to pay his lien was very different from the point which he made in the Indiana suit namely, that by virtue of the decree and otherwise he could appropriate the Indiana division alone to the payment of his lien. The validity of Compton's lien was upheld in each court. The question was as to the remedy. Certainly a decree of an Ohio court which directed the sale of Ohio property to satisfy a lien would not be conclusive

in an Indiana court of the right of the same plaintiff under Indiana law to appropriate Indiana property to the satisfaction of the same lien. It follows that as the points decided in the two cases were not the same, and as the subject-matter was not the same, the decree in the one court does not work an estoppel in the other to prevent an appeal.

A true copy.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

54 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1892.

JOHN C. COMPTON, Appellant, *vs.* JAMES R. JESSUP and EDWARD H. DIXSON *et al.*, Appellees.	No. 84. Appeal from the Circuit Court of the United States for the Northern District of Ohio, Western Division.

(April 2, 1895.)

Before Taft & Lurton, circuit judges, and Ricks, district judge.

Opinion of Lurton, Circuit Judge.

The contention of Compton that the paragraph reserving his rights should be construed so as to entitle him to an absolute decree against the purchaser for the amount due him under his Ohio decree, when it was determined that he had a lien, and regardless of its rank, is not founded in reason or justice. Such a construction would operate to prefer his claim over all others, without regard to the place and rank of the other lienors. What the court meant to do was to leave Compton's claim undetermined by the decree of foreclosure, and to reserve power and jurisdiction over the purchaser to enforce his lien by appropriate remedy under all the facts, if it should be found that he had one. This view is made manifest by the concluding sentence of the paragraph, which says: "It being the intention to hereby *preserve* the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto."

To attribute to this decree a determination that Compton's lien, if he had one, should override all others and entitle him to an absolute decree against the purchaser, would not be a *preservation* of the relation in which he stood to other lienors, some of whom
55 were asserting priority over Compton, but to destroy that relation and settle the rank of his lien, without a hearing upon that question. Such a clause should be interpreted in the light of the whole record preceding it and of the other portions of the decree of which it was a part, and of the issues which might arise upon Compton's claim, for he had not then answered. Read in this

light, the court adjudged nothing affecting Compton. The fact of a lien and the rank thereof was left undetermined. I was at first strongly inclined to the opinion that the effect of the whole decree was to sell the entire railroad free from all liens, including Compton's, and that his lien, like all others, was transferred to the proceeds of sale. Inasmuch as the foreclosure decree provided for the payment of the purchase-money chiefly in bonds and coupons secured under the several mortgages foreclosed, it was essential to the preservation of Compton's rights *in the fund*, that there should be reserved a right to require the purchaser to pay off Compton's lien if the rank of his lien was found to be such as to entitle him to payment out of the fund and in advance of securities which had been paid in by the purchaser. I still think there is much room for this interpretation of the decree, in view of its language and of the strenuous effort made by all the prior and subsequent mortgagees to offer the property free from all liens and incumbrances. This construction would operate to defeat any recovery by Compton, inasmuch as the two divisions covered by his lien did not sell for a sum sufficient to pay off the prior liens. I have come, however, to an appreciation of the injustice which this construction would do him. He was placed at some disadvantage by a sale in advance of the determination of his rank; the place of all others being fixed and known. This consideration, in the light of other parts of the decree lending support to the idea of a sale subject to any lien which Compton might successfully maintain, persuades me to adopt the view taken by the circuit court, that his lien was not foreclosed and that the property was sold free from all lien, charge or incumbrance save that of Compton. His attitude is, therefore, precisely what it would have been, with respect to remedy, if he had not been a party to the foreclosure proceeding. Instead of dismiss-ng the bill as to him, without prejudice, the circuit court sold subject to his lien and reserved jurisdiction to thereafter adjudge to him such relief by sale or otherwise as should be appropriate. What would be the proper remedy could not be foreseen and nothing in the saving clause deals with the question of remedy, beyond a reservation of jurisdiction over the purchaser to enforce such remedy as under established principles of equity should be appropriate. It was not improbable that the biddings on the divisions embraced within Compton's lien would be sufficient to pay off the prior incumbrances and Compton as well. If this had been so it is clear that the remedy would have been neither sale nor redemption, but a payment out of proceeds of sale. This unfortunately proved not to be the case. The sale accepted was under a bid for the entire line. The unit bid aggregated but an insignificant sum over
56 the aggregate of the separate bids on divisions. The bid on the Ohio division was for barely enough to pay off the two Ohio divisional mortgages, while the bid on the Indiana division was insufficient to pay off the second Indiana divisional mortgage, by more than a million of dollars. I quite agree with Judge Taft in holding, that under these circumstances the character of the remedy to which Compton was entitled must be determined " wholly

apart from anything in the decree for sale, because the saving clause leaves it entirely in the judgment of the court."

I also agree with him in the conclusion that under existing circumstances Compton is not entitled, either by force of the Ohio decree or under the general principles of equitable practice, to a decree for a resale, and that the only relief which a court of equity should afford him is that of redemption. Compton must stand as an unforeclosed lienor, obliged by change of circumstances to apply to equity for relief upon the footing of a decree which is non-enforcible according to its terms. Though nominally a defendant, he is really and substantially a complainant. It would be clearly inequitable to grant a decree for a resale of the Ohio property in view of the existing status. Such a decree now would be by no means the decree he obtained. If he had executed that decree before any obstacle arose, and obtained possession as a purchaser, he would have been obliged to have redeemed the senior mortgages. The remedy of a junior incumbrancer, both before and after foreclosure, is to redeem the senior mortgagee. Without the consent of the prior mortgagee a junior lienor could not enforce a sale of more than the mortgagor's equity of redemption. If he wished a sale free from the prior lien and the prior lienor will not consent, the decree should be that he redeem, and then foreclose for the enforcement of his own lien and that he had redeemed.

2 Jones on Mortgages, sec. 1394–5–6; 1580; 1439; 1431.
Jerome *v.* Custer, 94 U. S. 734.
Woodworth *v.* Blair, 112 U. S. 8.
McKornon *v.* Neff, 43 Ind., 503.
Spurgin *v.* Admonson, 62 Iowa, 661.

A judicial foreclosure sale is not void because one interested in the equity of redemption, as a junior mortgagee, was not a party.

"The sale vests the estate in the purchaser subject to redemption by the owner of the equity, or other person interested in it, who was not a party to the proceedings. His only remedy, however, is to redeem." Jones on Mortgages, sec. 1395.

Martin *v.* Noble, 29 Ind., 216.
Frische *v.* Kramer, 16 Ohio, 125.
Rose *v.* Page, 2 Sim. 471.
Fulghum *v.* Cotton, 3 Tenn. Ch., 299.
Frayser *v.* Indiana University, 39 Ind., 556.
Emigrant Savings Bank *v.* Goldman, 75 N. Y. 127.

57 I agree with him in the conclusion that Compton's only remedy is through redemption, not only for the reasons so forcibly stated by him, but upon other considerations which will hereafter be stated in connection with the question of entire or partial redemption.

I am not at all in agreement with him as to the duty of the court to allow a separate redemption of the Ohio divisional mortgages.

1. If we are right in the agreement that the decree reserving Compton's lien from foreclosure and his rights for future determina

tion, leaves all questions concerning the validity, extent and character of his lien and all questions touching the remedy for the enforcement of his lien as completely open as if he had never been a party to the foreclosure proceedings, then it must follow that his attitude now is that of a complainant. Neither should the court be moved to enlarge the remedy to which he would otherwise be limited by reason of the fact that he was made a defendant in the foreclosure suits and that he came in unwillingly. He was not enjoined from enforcing a sale under his State decree, and might have proceeded with his sale although made a defendant to the general foreclosure proceedings. Why did he elect to abandon the remedy the Ohio court had awarded him? The answer is obvious. So many obstacles had arisen both pending his suit and after his decree that his remedy by sale had become practically unavailable. Pending his suit the United States courts had taken possession of the entire line of railroad of which the Ohio division was but a part; first, under the general insolvency bill filed by the Wabash, St. Louis and Pacific Company *v.* Central Trust Company and others, and finally under an extension of that receivership to the foreclosure suits out of which this controversy arose.

The pendency of his suit was no obstacle to the institution of these subsequent foreclosure proceedings, and none to the seizure of the property by the courts in which they were begun. If he had not been made a party to these subsequent foreclosure suits and had proceeded with his sale under his decree, the purchaser would have been obliged to have intervened in order to have obtained possession, or, to have waited until the receivers were discharged and then by an independent suit with the purchaser under the Federal foreclosure decree had his right and title determined. In either case as the owner of a mere equity of redemption obtained under a foreclosure decree, to which senior mortgagees were not parties, he could have obtained no relief except through redemption of the prior liens. No injury was done him by making him a party to the subsequent suits in which it was sought to sell the property free from all liens and to marshal the assets according to priorities. Indeed, he was a *proper* party to a simple foreclosure of the mortgages senior to his own lien, and a *necessary* party to any decree intended to convey to the purchaser a clear title. In such a suit his natural attitude would be that of an active rather than a passive party. Such, in fact, was the po-
58 sition which he at once assumed when he found that he could not escape the jurisdiction, for he availed himself of the decree which required that all answers theretofore or thereafter filed, which stated matter that was proper foundation for affirmative relief, should be deemed and taken as cross-bills. By his answer he sought: first, the enforcement of his Ohio decree by a sale of the Ohio division separately from all other parts of the road; second, to reach and subject to his lien certain terminal properties at Toledo, Ohio, of great value, which he claimed had been acquired after the Ohio divisional mortgages and had not passed to the Ohio mortgagees; third, he claimed priority over the divisional mort-

gagees in all of the rolling stock and equipments acquired after the prior mortgages; fourth, he demanded an accounting as to the earnings of the Ohio division, claiming that they were greatly in excess of its share of operating expenses, and that the surplus had been improperly applied to the support and improvement of other divisions of the consolidated line.

From the filing of that pleading down to the final decree from which he has appealed he was in the attitude of one seeking relief by a sale, or by redemption, if that was inadmissible. After the foreclosure decree his status was more than ever that of one applying to a court of equity for relief upon the footing of a former decree which by circumstances subsequently ensuing could not be advantageously enforced without further aid.

That the court did not foreclose his lien, along with those of the other lienors, was a matter of pure grace and indulgence to him. That the rank of his lien was undetermined was no obstacle to a foreclosure sale by which all liens would have been transferred to the proceeds of sale.

Bank *vs.* Shedd, 121 U. S., 74.

Yet that indulgence is now made ground for complaint and demand is made for a resale, or for granting him a separate redemption of the Ohio mortgages even though otherwise unentitled. I see no merit in this claim for indulgence whatever.

2. In the determination of the question as to whether Compton may redeem the Ohio division without also redeeming the Indiana mortgagees, the remedy awarded him by the Ohio court should have no conclusive effect whatever. In permitting him to sell so much of the road as was within the State of Ohio subject to the senior liens thereon, the court did not adjudge him to have a separable lien on the Ohio division and another on the Indiana property. It merely awarded him a sale as at law, under execution. Because the court limited the sale awarded to the property within its jurisdiction it is not to be inferred that it thereby adjudged that Compton had one lien embracing two separable equities of redemption. No question as to whether under his lien he could redeem separately was submitted, involved or decided. The remedy awarded
appears to me to pertain to process and not to be within the
59 principle of *res adjudicata* even as to the parties to his suit.

Clearly no estoppel exists in consequence of the grant of that remedy applicable either to the two original mortgagor companies or any of their mortgagees inasmuch as they were not parties to his case. If any legal or equitable reason existed before that decree which would enable them, or either of them, to require redemption of all the mortgages senior to his lien or none, that right remained unaffected by a decree to which they were not parties.

The Ohio court in its statement of the case described the suit and the issues presented and the relief sought, by saying,

"This was an action commenced in the court of common pleas of Lucas county, by James Compton, asking that certain bonds of which he claimed to be the owner, with the unpaid interest coupons

thereon, should be declared a lien upon so much of the road of the Wabash, St. Louis & Pacific Railway Company as formerly belonged to the Toledo & Wabash Railway Company, by whom the bonds had been issued; and for the finding of the amount due him thereon; and an order of sale of so much of its road as is within the jurisdiction of the court, subject to certain admitted prior liens, unless the amount found due him should be paid by the Wabash, St. Louis & Pacific Company in a short time, to be named; and for other relief."

Compton *v.* W. St. L. & P. R. Co. 45 Ohio State.

The only other reference to a remedy in the course of a very lengthy opinion is found near its conclusion, the court simply saying:

"The plaintiff is entitled to a finding of the amount due on the bonds held by him, and an order for the sale of so much of the road as is within the jurisdiction of the court."

I am utterly unable to agree that the limitation upon the order of sale or so much of the road as was within the State is an adjudication conclusive upon all the parties to that suit "that he has a lien which may be enforced against the Ohio division alone without regard to his remedy against the Indiana division," "and that he may redeem it by paying to the purchaser, the Wabash, St. Louis & Pacific Railway Company, the amount due on the Ohio divisional mortgages." This conclusion that because he was permitted to sell the Ohio division separately that, therefore, he may redeem it separately, seems to me utterly unsupported by the premises; yet, Judge Taft seems to rest it upon the assumption "that against all the parties to his Ohio suit he may exercise this right because it was incident to the relief granted in the Ohio decree."

3. But if it be assumed that a right to separately sell the Ohio division is within the estoppel of that decree as to the parties, it is not incumbent on a court of equity when a complainant applies to it for relief upon an ineffective decree which cannot be enforced without further equitable aid, to extend him any assistance unless he will do equity. In the determination of what relief he
60 is entitled to the court cannot escape a consideration of his rights with reference to the mortgages senior to his lien, as well as his rights in relation to the other titles, rights and equities united in the purchaser from whom redemption is sought. If his decree is ineffective for want of means to execute it; if the remedy awarded him by his decree is insufficient and incapable of practical enforcement, then the court will look into his decree, even as to its merits, and refuse to enforce it except in so far as it may deem just and equitable. The doctrine on this subject may be thus stated.

When a decree is incomplete, or becomes ineffective for the want of means by which it may be executed, and application is made to a court of equity to render the decree effective, the doctrine of *res adjudicata* will not operate to prevent the court from looking into the nature and character of the decree for the purpose of determining whether it would be just and equitable that the complainant

should be assisted and his defective decree pieced out. If the decree be found unjust and inequitable, the court under such circumstances will not be moved to action, but leave the party to his remedy at law, or extend aid on condition that he do equity.

2 Daniel Ch. Pl. 4th ed. 1586.
Adams, Equity, 416.
Gay *v.* Porport, 106 U. S. 699.
Lawrence Manufacturing Co. *v.* Janesville Cotton Co. 138 U. S. 552.

This doctrine in its last analysis rests upon the settled principle that he who seeks equity must do equity. Manifestly this principle must apply to a case like the one in hand, when the question is purely one of remedy. This court ought not to grant any relief except such as in equity and justice is appropriate under all the circumstances.

This doctrine would apply if the defendant resisting partial redemption united in itself only the rights of the mortgagor corporation and the mortgagees who were parties to the Ohio decree.

If this doctrine goes so far as that the court may look into the merits of the decree which it is asked to piece out, *a fortiorari* it is applicable when such a complainant demands a particular remedy because it is supposed to be an "incident" of the remedy which has become impracticable or because it is supposed to be most analagous. Before a court of equity will be moved to lend its aid to an ineffective decree it will inquire into all the circumstances calculated to enlighten the conscience of the court and grant its aid only upon such terms and conditions as are just.

4. Among the matters which the court should take cognizance of when Compton asks to be allowed a separate redemption of the Ohio property is an inquiry as to his right to redeem at all for want of proper parties. The lien which he asserts is not one for his exclusive benefit. All of the unpaid creditors of the Toledo & Wabash
61 Railway Company are equally entitled to share in the security which he is undertaking to appropriate to the satisfaction of his own claims. The Ohio decree made no disposition of the proceeds to arise from the sale awarded him; but directed that the proceeds should be paid into court and held subject to further orders to be made on the footing of the decree. The decree itself only *declared* the lien. The *line* is the creature of statute and arose upon the consummation of the consolidation of 1865, by force of the statute, and his decree adds nothing to its efficiency aside from the finding that he was a creditor.

Compton's Ohio suit ought to have been a suit for the equal benefit of all entitled to share in the benefits of the lien asserted. It was not. His present suit should have been a suit for the benefit of the whole class, *and so brought as to quiet the title of the present owner of the property.* It is not. His decree amounts to nothing more than a declaration of a valid and unsatisfied lien, superior in rank to all mortgages subsequent to the consolidation of 1865, and inferior to all antecedent to that date. That the defendants to the suit in

which the statute was construed and the lien declared did not demur because his suit was not a class suit, is no answer to the objection now interposed, *when he asks for a different remedy in aid of an otherwise ineffective decree.* But if the Toledo & Wabash Railway Company be regarded as cut off from interposing such an objection in so far as it is the assignee and representative of the mortgagors and mortgagees who were parties to his Ohio suit, yet in so far as it is the assignee of the mortgagees who were not parties it is not estopped. The objection lies at the very foundation of his right to a partial redemption, because it will leave the defendant corporation holding the remainder of the estate embraced within the lien subject to future redemption by the appellant or any other creditor interested in the class lien. But more than this, the appellee as the equitable assignee of mortgages junior to the Compton lien has the unquestioned right to redeem from the creditors entitled to the benefit of the lien. They are perhaps hundreds in number and the aggregate of their claims is wholly unknown. If it redeem from Compton by paying off his debt, it will continue subject to a like liability for an unknown amount and to an unknown number of people. It may be said that this is an objection which applies to any redemption at all by him. This may be admitted, for undoubtedly Compton should have so brought his case as to bring all interested in the lien before the court that the purchaser under junior liens might have the option of redeeming this lien and quieting its title or submitting to redemption and surrendering its title to the property covered by this lien. Not having done this, he ought not to be allowed to further aggravate the situation by compelling the appellee to submit to partial redemption.

5. There are other objections which are peculiarly applicable when a complainant seeks relief through equitable redemption.

62 The senior mortgages upon the Indiana and Ohio divisions operated to vest in the mortgagees the legal title, subject to divestiture upon payment of the debts secured within the time limited by the contract. The failure to pay on the pay day made the title at law absolute. There was no statutory right of redemption, and no redemption or buying back was admissible, except through application to a court of equity. Chancery courts to relieve against the forfeiture which at law was absolute have created an equitable right of redemption, which it allows upon equitable principles and subject to the equitable maxim that, "he who seeks equity must do equity." Of course a court of chancery does not through this maxim obtain authority to impose arbitrary conditions not warranted by settled principles of equity jurisprudence. The boundaries within which it may be applied are well defined by Mr. Pomeroy, who says:

"The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded or will admit and provide for all the equitable rights, claims, and demands justly belonging to the adversary

party, and growing out of or necessarily involved in the subject-matter of the controversy. It says in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given or consents to give the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit."

Pomeroy's Eq. Jurisprudence, sec. 385.

The first objection which has been urged to a partial redemption grows out of the relation of principal and surety which exists between the Toledo, Wabash & Western Railway Company and the Toledo & Wabash Railway Company.

In November, 1858, the Ohio and Indiana mortgagor companies consolidated their properties and were merged into a new consolidated company entitled The Toledo and Wabash Railway Company, which new company subsequently issued the bonds called equipment bonds, of which Compton holds one hundred and fifty. The result of this consolidation is very tersely stated by Mr. Justice Gray when considering the effect of this very consolidation, who said the result was a new corporation, "which took their places, succeeded to their property and assumed their liabilities."

Wabash, St. Louis and Pacific Railway Company *vs.* Ham, 114 U. S., 595.

Shields *v.* Ohio, 95 U. S., 319.

Compton *v.* Railway Company, 45 Oh. St., 623.

The Ohio consolidation statute under which the successive consolidations occurred was passed April 10, 1856, and expressly provided that:

63 "All debts, liabilities and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

The Indiana act of Feb. 23, 1853, authorized the consolidation of railroad companies which might connect at the State line with a road of another State constructed to the State line, "upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining State with whose road or roads connections are thus formed."

1 Gavin & Heard's Statutes, 526.

The consolidation agreement among other things provided:

"That the said consolidated company shall assume, and be liable for all outstanding bonds, indebtedness and other liabilities of each of the parties to this agreement, and all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

The undoubted and undisputed effect of this consolidation was, that the Toledo, Wabash & Western Railway Company became ob-

ligated to pay off and discharge each one of the four mortgage debts which existed at the date of this consolidation in 1858. Its liability was not merely that of one buying property subject to an existing incumbrance, for it personally assumed and by the statute became personally liable for the entire indebtedness of its constituent companies. This much is expressly decided by the Ham case and the Compton case, heretofore cited. Precisely the same liability was imposed upon each of the successor consolidated companies who by subsequent consolidations succeeded to the property of the original mortgagor companies. This is very clearly recognized in the opinion of Judge Taft when he says, in his statement of the case, that "many of the constituent companies had issued bonds secured by mortgages upon their respective lines, and as consolidations took place, the new companies assumed the obligations of the bonded and other debts of their constituents."

The successive assumptions of these prior mortgage debts did not operate to release or discharge the liability of the original mortgage debtors or that of any obligor by assumption precedent to the last consolidation. The original mortgage debtors, and each succeeding obligor, were liable to the creditors as joint and several principals, and for deficiency in value of mortgaged property the creditors might have judgment against any or all who were thus liable as principals. The Ohio statute authorizing consolidations for the purpose of preserving the rights of creditors, provided that,
64 "the respective corporations may be deemed to be in existence to preserve the same."

"A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety; but the mortgagee, unless he has assented to such an arrangement, may treat both as principal debtors and may have a personal decree against both. The mere assignment by the mortgagor of his interest in the mortgaged premises to a third person, who agrees to pay off the mortgaged debt, does not release the mortgagor. There is no novation unless there is something to show that the mortgagee has released the mortgagor, and has agreed to look solely to the purchaser for payment of the mortgage debt."

Jones on Mortgages, sec. 741.
Shepherd *v.* May, 115 U. S., 510.
Burr *v.* Burr, 24 N. Y., 178.
Ellis *v.* Johnson, 96 Ind., 327.
Union Ins. Co. *v.* Hanford, 27 Fed. Rpt., 588.

As between the mortgagor, and his successor in the title who assumes the payment of the debts charged thereon by prior lien, and the mortgagee, the land is the primary fund for the payment of the debt.

Wells *v.* Tucker, 57 Vt., 223.
Jones on Mortgages, secs. 740, 741, 743, 678*a*.
Worcester Bank *v.* Thayer, 136 Mass., 459.

Thus the property which the Toledo, Wabash & Western Railway Company acquired by consolidation of the constituent companies

was, as between those companies and their mortgage creditors, the primary fund for the discharge of the mortgage debts. If mortgage creditors release this property without the consent of the original-debtor companies, it thereby discharges them to the extent of the value of the security thus abandoned.

Paine *v.* Jones, 14 Hun., N. Y., 577.
Remsen *v.* Bukman, 25 N. Y., 552.
Browne *v.* Lynde, 91 N. Y., 92.

This right of the surety companies to have the property which became a primary fund applied in exoneration of their relations as sureties for the new consolidated company, is not a right which can be affected or waived by any successor company which occupied the relation of principal toward such surety. The surety entitled to such exoneration might waive it, and so could the creditor, but, as we have seen, a creditor would thereby release the obligation of the surety to the extent of the value of the property released. This principal has no application as a consequence of the original consolidation by which the Toledo & Wabash Railway Company was formed in 1858. Its constituent companies were not sureties for each other and the promise of the consolidated company was a separate promise to each of its constituents. The obligation of the Toledo & Wabash Railway Company, so far as it rested upon the consolidation
65 agreement, to pay the debts of its Indiana constituent, was to that constituent alone, and the Ohio constituent could not object to a separate sale of the Ohio division or its separate redemption, for no obligation to it would be violated. But quite a new state of affairs arose so soon as the second consolidation occurred in 1865. The consideration for the consolidation which moved to the Toledo & Wabash Railway Company was that in consideration of all its property the new consolidated company, the Toledo, Wabash and Western Railway Company, would pay all its obligations and liabilities of every kind and character. This, of course, included its obligations to pay off the two Indiana divisional mortgages and the two Ohio divisional mortgages, all four of which had been assumed as a condition of the consolidation in 1858. Upon the consummation of this act of consolidation, there arose the relation of principal and surety between the Toledo, Wabash & Western Railway Company and the Toledo & Wabash Railway Company, which relation resulted in an obligation of the former company to apply all of the property of the latter company in discharge of its debts and in exoneration of its liabilities. The consolidation agreement by which the Toledo, Wabash & Western Railway Company was formed in 1865, set out the indebtedness of the Toledo & Wabash Railway Company, and made no distinction between the mortgages on its Indiana and Ohio divisions. Its bonded debts were described as:

First mortgage bonds	$3,400,000
Second " "	2,500,000
Equipment bonds	600,000

It provided that all its rights, franchises, property, debts and choses in action should vest in the consolidated company, and that the consolidated company should "protect" all of its indebtedness as it should fall due.

Thus the Toledo, Wabash & Western Railway Company assumed the relation of principal obligor as to all the debts and obligations of its constituents, the Toledo & Wabash Railway Company. The latter company continued bound to the creditor, but as between it and the Toledo, Wabash & Western it was a mere surety. Out of this relation originates the right of the Toledo & Wabash Railway Company to object to partial redemption, a redemption by which the Ohio division which is worth more than the mortgage debts secured specifically thereon may be redeemed separately, leaving the Indiana mortgage debts unpaid and inadequately secured to the extent of $1,300,000.00, as demonstrated by the bids on that division under the foreclosure decree. Such a redemption would leave the Toledo & Wabash Railway Company liable on the Indiana bonds to the extent of this deficiency. It would have the right to insist that the whole of its property conveyed to the Toledo, Wabash & Western Railway Company shall be applied in its exoneration, and if that corporation was today seeking to redeem that part of the property which was of greater value than the mortgage debts
66 specifically secured thereon without also redeeming the Indiana mortgage debts which were inadequately secured, its objection in a court of equity would be potential and the Toledo, Wabash & Western Railway Company would be required to redeem all or none, on the principle that it must do equity as a condition of equitable redemption.

It may be urged that this right of the Toledo & Wabash Railway Company to object to separate redemption upon the ground of its surety relation to the Toledo, Wabash & Western Railway Company is one which can only be made by it, and that it has never been a party to any of these foreclosure suits. Compton did not bring that corporation before the court in his Ohio suit and he has not chosen to make it defendant to his present effort to obtain separate redemption.

It was not a necessary party to either suit, in so far as the establishing of his debt and lien were concerned. He might bring his suit against the corporation which had succeeded to the title and ownership of the property and which had assumed a primary obligation for his debt. But he cannot escape the effect of any defense to a separate redemption which any of the predecessors in the title might make, by omitting to bring such predecessors before the court. When he asks for partial redemption and the court can see that that relief would be inequitable and unjust to one of the obligors of his debt, in its relation as surety to other parties jointly liable as to him, it will either refuse to proceed with the suit until he brings the absent corporation before the court, or grant him only such relief as is consistent with the equities and rights of all affected by the remedy he asks. But it seems to me on careful consideration, that the purchaser at foreclosure sale unites in itself the legal

title and the equities, rights and defenses which pertained to each of its predecessors in title and may interpose any defense to the demand for separate redemption which any one of its predecessors could make if they were called upon to submit to such redemption. If this is not so, then the absent predecessor corporations to be affected by the special relief sought, are necessary parties to any proceeding which seeks such relief.

If I am right in the proposition that the Toledo, Wabash & Western Railway Company could not redeem the Ohio division separately by reason of the surety relation of which I have spoken, then for the same reason Compton cannot. His lien arose as the result of the consolidation of 1865.

The lien did not attach as a lien on property of the Toledo & Wabash Railway Company, but as a lien on so much of the property of the Toledo, Wabash & Western Railway Company as had been acquired from the Toledo & Wabash Railway Company. The language of the consolidation statute which imposed a liability on the consolidated company for the debts of the constituent companies was that, "all debts, liabilities and duties of said companies shall henceforth attach to said new corporation and be enforced against it to the same
67 extent as if said debts, liabilities and duties had been contracted by it." Sec. 5, act of April 10, 1856.

This was the language which the supreme court of Ohio in Compton's case construed as attaching an equitable lien upon the property of the Toledo, Wabash & Western Railway Company which it had received from the Toledo & Wabash Railway Company. The decree upon which Compton predicates his suit recites:

"That upon the consummation of such consolidation said bonds issued as aforesaid by the Toledo & Wabash Railway Company, * * * became an equitable lien upon all of the said railroad and real property, * * * which were owned by said Toledo & Wabash Railway Company, at the time of said consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company and which afterwards passed to and vested in the defendant, The Wabash, St. Louis & Pacific Railway Company."

The lien did not exist before the consolidation but arose as a result of the act transferring the property. To say that a lien which originated only as a result of the passage of the title is a lien against the company whose act transferred it to another, would be as inexact as to say that a vendor's lien rests upon the property of the vendor, when in fact it originates as a result of the passage of the title and must be a lien on the estate of the vendee in the property. The distinction is a nice one, but it is an obvious one when we look closely into it. It is also an important fact in its consequences, for if a lien imposed on the property of the Toledo & Wabash Railway Company, while owned by that company, would, as urged by Judge Taft, be a lien upon the separable equities of redemption owned by that company, a lien imposed after the transfer of the title of the Toledo & Wabash Railway Company to the Toledo, Wabash & Western Railway Company which took under a single engagement or promise to pay off the debts of the Toledo & Wabash Railway

Company, would bring into operation the principle that such single promise required a single redemption. *Compton's right of redemption cannot be other or different than that of the corporation upon whose property the lien rested*, whether imposed by law or arising out of contract. It must, therefore, follow, that if the Toledo, Wabash & Western Railway Company could not redeem part without redeeming all, that Compton with a lien which rests on its estate can exercise no higher right of redemption.

There seems to me to be still another principle applicable where equitable redemption is sought which reinforces what has already been said. That principle is, that where several mortgage debts have become consolidated so that the obligor in each is the same and the mortgagee the same, though secured on distinct estates, there can be no separate redemption against the will of the mortgagee.

The principle that a creditor will not be deprived of a legal
68 advantage by a court of equity, except upon equitable conditions, is of wide application. It was imbedded in the civil law, and a mortgagor was not permitted to redeem or buy back the legal title to realty, or the possession of a pledge, until he did equity by paying not only the debt secured by the mortgage or pledge, but any other debt subsequently created.

Story Eq. Jurisprudence, sec. 415.
Sec. 1010 and note.
Jones *v.* Rogers, 15 Mass. Rpt., 3.

There is some doubt as to whether a purchaser of the mortgaged land, or a subsequent incumbrancer, was affected by this equity between mortgagor and mortgagee. Judge Story thinks that under the civil law the doctrine was limited to cases where no subsequent incumbrance was involved, while Chancellor Kent takes the contrary view.

Story's Eq. Juris., sec. 1010—Note.
4 Kent Conn. Lecture 58, p. 136.

Almost contemporaneously with the earliest announcement of the doctrine, that equity would relieve against the forfeiture of the legal estate and permit redemption after default, there was announced a condition upon which such equitable redemption would be accorded. That condition was, that when there were two distinct mortgages upon distinct parts of the same mortgagor's estate, to secure distinct debts due to same mortgagee the mortgagor would not be permitted to redeem one of his estates without at the same time redeeming the other, where it appeared that one of the debts was insufficiently secured. This was the simple rule as announced and applied in the early cases.

Purefoy *v.* Purefoy, 1 Vernon, 29.
Shuttleworth *v.* Laycock, 1 Vernon, 245.
Morgrave *v.* Le Hooke, 2 Vernon, 207.
Pope *v.* Onslow, 2 Vernon, 286.
Willie *v.* Lugg, 2 Eden, 78.
Jones *v.* Smith, 2 Vesey, Jr., 376.

In Willie *v.* Lugg, cited above, the lord chancellor stated the rule and the reason on which it stands as follows:

"This bill is brought to redeem the East Dales, and to leave Dixon's farm, now reduced in point of value by the mortgagees selling a part for the benefit of the plaintiff, who had the inheritance. The question is, whether she can come into this court for such an equity.

Every mortgagee, when the mortgage is forfeited, has acquired an absolute legal estate. Upon what terms can this court proceed to a redemption? By giving the mortgagee the value of his money, its fruits, and his costs, and upon those terms only; for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for.

If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are
69 separate, yet if the mortgagor would redeem one, he cannot; because if you come for equity you must do equity; and the general estate being liable to both mortgagees, this court will not be an instrument to take illegally from a mortgagee that by which he will be defrauded of a part of his debt."

The editor of the second edition of Eden's Reports, in a note concerning the modern extension of the rule as stated in Willie *v.* Lugg, says:

"That a mortgagor of two distinct estates, upon distinct transactions, to the same mortgagee, cannot redeem one without redeeming the other, seems, by modern decisions, to have been extended to a purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage."

The cases of Watts *v.* Syme, 1 De G. Mac & G. 240; Shelby *v.* Pomfret, 1 J. & H. 336; Neve *v.* Pennell, 2 H. & M. 170, are applications of the rule of the old cases in suits for foreclosure, as well as redemption.

Beevor *v.* Luck, 4 L. R. Eq. Cases, 537; Tassell *v.* Smith, 2 De G. & J. 713; Vint *v.* Padgett, 2 De G. & J. 611; Mills *v.* Jennings, L. R. 13 Ch. Div., 639; Cummins *v.* Fletcher, L. R. 14 Ch. Div., 699, are all cases involving extensions of the old rule to subsequent purchasers or mortgagees, many of them involving the technical doctrine of tacking as developed from the early cases of Brace *v.* Duchess of Marlborough, 2 P. Wms. 491, and Marsh *v.* Lee, 2 Ventris, 337. That doctrine in brief terms was bottomed on the maxim of non-interference between equal equities.—Adam's Equity, 162.—Through that maxim if a third mortgagee advanced his money without notice of a second mortgage, he was permitted to buy in the first mortgage, thereby obtaining the legal estate, and then tack the third mortgage to the first and require the second mortgagee to redeem both. This enabled the third mortgagee to squeeze out the intermediate incumbrancer by buying up a first mortgage, even when the second mortgagee's bill for foreclosure was pending. And this rule the Lord Chief Justice Hale, with whom the rule in a large measure originated, called a "plank" gained by the third mortgagee, or *tabula in naufragio.*

In Jones *vs.* Smith, 2 Vesey, Jr., 376, and Mills *vs.* Jennings, cited above, the old rule in its simple form is stated, as well as the ground on which it stood. In Mills *vs.* Jennings, Cotton, lord justice, so well states the original doctrine and the grounds upon which it has been extended, that I deem it best to make a liberal quotation:

"The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates the property of the same mortgagor, one of these cannot be redeemed without the other, and this is so whether the two mortgages were originally granted to the same mortgagee, or, having been originally vested in different persons, *have by assignment become vested in the same person.* This was on the equitable principle that a court of equity would not assist a mortgagor in getting back one of his estates unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a court of equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of a larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord Hardwicke in the year 1750, as appears by the report of *Ex parte* King (1), though he afterwards recognized and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims."

* * * * * * *

"It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate, as soon as the second mortgage is created, a right to get both the mortgages into his hands, and to hold both until the debt due on each is paid. The principle which allows as against a subsequent purchaser or mortgagee the right of consolidation is that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequent to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgages on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts

done by the vendor of the equity of redemption previously to the sale; and the act after sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity."

71 Mills *vs.* Jennings 13 L. R. Ch. Div., 639.

The doctrine established by the tacking cases proper, that a third mortgagee, without notice, may buy in a first mortgage and thereby exclude a second mortgage, is not enforced in the courts of this country, in consequence of the effect of our registration system, which gives effect to conveyances in the order of registration. The policy underlying registration is that a mortgage shall not be a security for more than is expressed therein *as against subsequent purchasers* or *mortgagees*. I quite agree with what was said by the Virginia supreme court through Baldwin, J., in Siter and others *vs.* McClanachon and others, 2 Gratt., 304, that:

"The elements of the doctrine, it will be seen, are the possession by the preferred mortgagee of the legal title, and the pre-existence or accession of a distinct equity, without notice of mesne incumbrance. Hence it is obvious, that it could never have been introduced into a country enjoying the benefits of a general registry, intended to give notice to the whole world of all conveyances and incumbrances, and to supply the place of actual notice. * * * In nearly all the States of this Union, the registry is held to be notice to subsequent purchasers and mortgagees, provided the deed has been duly proved or acknowledged. * * * It is easy to perceive that the operation of the registry laws of Virginia, and of other States of the Union, is to cut up by the roots the English doctrine of tacking, *so far as it effects intermediate purchasers and incumbrancers.*"

It is equally clear that our registration system renders inoperative many of the principles upon which the rule now involved was extended so as to effect subsequent purchasers and incumbrancers.

But registration laws manifestly have no effect upon the rule as between mortgagor and mortgagee, or the application of the maxim, upon which the doctrine rests, whenever a plaintiff resorts to equity to redeem or to recover the legal title to lands or the possession of a pledge. If he seeks equity he must do equity, and equity will not assist a debtor to deprive a creditor of a security which at law he may hold until he has done equity by discharging any just liability which exists between them.

Great care must be observed in examining American cases touching this species of tacking, to see that they do not turn on the rule which makes the registration of a deed notice. Whenever they do so turn they are not in point. Where the question arises between

unregistered equities, or when the registry acts are from any cause inapplicable, there "seems to be nothing to prevent the holder of a third mortgage, from obtaining priority over a second of which he was ignorant at the time of taking his own, and which has not been placed on record, by buying in the first, or obtaining a conveyance of the legal title in any other way, although the question is of little practical importance, because it cannot arise unless both mort-
72 gages are unrecorded, when it will be easier to record the third, than to resort to the expedient of purchasing the first."
Part 1, W. & T. L. C. Eq., 856.

There are many American cases illustrative of the application of this equitable maxim to bills seeking to recover a legal title or to redeem a mortgage where the interests of third persons had not intervened.

Baggally *v.* Guthrie, 2 Jones Eq., (N. C.) 8.
Conall *v.* Johnston, *ib.*, 120.
Chase *v.* McDonald, 7 Harris & Johnson, 196 '7.
Coombs *v.* Jordon, 3 Bland, 284.
Lu *v.* Stone, 5 Gill & Johnson, 22.
Downing *v.* Palmateer, 1 Monroe, 70.
Hughes *v.* Worley, 1 Bibb, 200.
Colquohon *v.* Atkinsons, 6 Munford, 550.
Siter *v.* Clanachan, 2 Gratt., 299.
Walling *v.* Aiken, 1 McMullin's Eq., 2.
Chamberlain *v.* Thompson, 10 Conn. 251.
3 Day (Conn.) 397.
Rowan *v.* Sharpe Rifle Co., 29 Conn. 324.
Scripture *v.* Johnson, 3 Conn. 211.
Bank *v.* Rose, 1 Strob. Eq. 257.
Anthony *v.* Anthony, 23 Ark. 479.
Williams *v.* Love, 2 Head (Tenn.) 80.
McGoldrick *v.* McGoldrick, 2 Cooper Ch. Rpt., (Tenn.), 543.
Evans *v.* Belmont Land Co., 92 Tenn., 348.

I am quite aware that some of the State courts have abandoned every vestige of the doctrine concerning even this species of tacking. In some this has been attributable to the abandonment of equity procedure altogether, in others, like New York and Michigan, where the courts hold that the mortgagor retains the legal title, the mortgagee being a mere lienor, there was, as a consequence, no necessity for equitable aid in recovering the legal title.

In courts of the United States the holding, where by the local law of the State a different ruling has not been required, has consistently been in accord with the English common-law and equity cases as to the title of the mortgagor. When the jurisdiction of the United States courts is invoked by a mortgagor, or a junior lienor, to allow equitable redemption, it seems to me that we are not warranted in according it without annexing those equitable conditions which have been announced by the courts whose decisions lie at the very foundation of our jurisdiction, and which accord with justice and

conscience. So far as the American system of registration conflicts with these rules, they are no longer entitled to our allegiance, but so far as that system of statutes has left play for the fundamental condition that "he who seeks equity must do equity," we should accord to the old cases full weight.

My conclusion is that the Toledo, Wabash and Western Railway Company, having assumed both sets of mortgage debts
73 at the time it acquired the mortgaged estate, could not redeem one part of the estate without redeeming the other, the mortgagees being the same. Does Compton occupy any better position? Clearly not. He is not an incumbrancer by a single instrument on *one* of the mortgaged estates. Neither is he a purchaser for value of the mortgagor's interest in one or both. By force of the Ohio statute the debts due from his debtor became, under the Ohio construction of that statute, an equitable charge on all the property of the Toledo and Wabash Railway Company in the hands of the Toledo, Wabash and Western. This general unit lien is the one asserted now by Compton as affording him a right in equity to redeem a part of the property embraced by the lien. The *very least* that can be said is that he can stand with respect to redemption, in no better situation than did the Toledo, Wabash and Western Railway Company. If that company as a principal obligor had a right as their mortgaged debts matured to pay them off, that right terminated when the pay-day passed and nothing remained but an equitable right to be relieved from the forfeiture by resort to the equitable right of redemption. But payment would have extinguished the debts and the mortgage, and he does not propose to pay off these mortgage debts. He wishes on the contrary, to redeem and keep them alive for his own benefit, and will seek in turn to be redeemed by subsequent lienors. His extreme right is to exercise the right of redemption which the Toledo, Wabash and Western Railway Company might do if it were seeking redemption. That right in its most favorable statement for him, was to pay and extinguish these mortgages on the pay-day, or in default, pray to have accorded him that equity of redemption which under the facts might be exercised by the Toledo, Wabash and Western. There is nothing in the Ohio consolidating statute which indicates any purpose to in any way impair or effect any right in law or equity which any creditor of a constituent company had. Upon the contrary, the act expressly provides: "that all rights of creditors, and all liens upon the property of either of said corporation-, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same."

But it is said that the mortgagees are not the same and that this doctrine has, therefore, no application. The trustee in each of the two first mortgages was the same corporation, and the trustee in the two second mortgages was the same person. What is meant by this objection is that the present holders of the bonds are not or may not be the same persons, and that the doctrine applies only where the beneficiaries in the consolidated mortgages are the same persons. That the beneficiaries are not the same persons under

each mortgage is an assumption. The only information which the court has about the subject is that the bonds secured by each mortgage were made payable to the mortgagee named therein, or bearer, and that S. Fisher, Edmond Pepper and J. H. Purdy were made defendants "as a committee representing certain holders of first-mortgage bonds of the Toledo & Illinois
74 Railway Company, and Lake Erie, Wabash & St. Louis Railroad Company," these being the original mortgagor companies. But it seems to me that it is not essential to the application of this doctrine that the beneficiaries under such mortgages as these, mortgages intended to secure negotiable bonds, should be identically the same persons. Such mortgages are in many respects peculiar and are quite modern in development. The legal title is in the trustee. He alone can sue and be sued in a court of law. He must perform all the duties of the holder of a legal estate and is bound to protect, defend and enforce the trust. His negligence or laches affects the beneficiary. He may enforce the trust without the presence of any beneficiary. So a bill to redeem will lie against the trustee alone, or he may redeem a senior lien on his own suit. It seems to me that under such peculiar trusts that the union of the securities in the same trustee gives operation to the equity arising from the consolidation. If this be not so, then the doctrine can never be applicable to such mortgagees, for the beneficiaries are never likely to be the same persons on any two days of the life of the bonds.

7. Another objection to separate redemption applicable if the court has any discretion lies in the injurious consequences resulting from the unnecessary severing of a line of railway.

The property on which he has a lien is a railroad, lying partly in two States. From its construction in 1852, by two independent companies, it has been managed and operated as a unit, and since 1858, has been owned as one property and run by one corporation. If it cannot be owned, held and operated as an entirety, it will manifestly be most disastrous to all persons concerned. As observed in Muller *v.* Dows, 94 U. S., 449: "A part of a railroad may be of little value when its ownership is severed from the ownership of another part, and the franchise is incapable of division."

It has been the settled policy of courts to treat a railroad as an entirety and to prevent its severance even though subject to partial mortgages.

Muller *vs.* Dows, 94 U. S. 449.
Union Trust Co. *v.* Ill. Midland R. R., 117 U. S. 466.
Bank *v.* Shedd, 121 U. S. 87.

No court has expressed more decided views on this subject than the supreme court of Ohio.

The Dayton, etc., R. R. *v.* Linton, 20 Ohio St. 401.

In Columbia Finance & Trust Co. *vs.* Kentucky Union R'y Co., 9 C. C. A. 265, this court held, that a railroad was not subject to redemption after foreclosure sale under a statute of Kentucky which

provided, that all *real estate* sold under any order or judgment of a court should be appraised, and subject to redemption after the sale if sold for less than two-thirds of its appraised value. This decision was in accord with that of Hammock *v.* Trust Co., 105 U. S. 107;
and both proceeded upon the idea that a railroad was an
75 entire thing, incapable of severance without great destruction in its value, which consisted in a large degree in its maintenance as a unit.

To allow the separate redemption of the Ohio part of the line is to sever ownership and management, and destroy the unity of the line. It is idle to say that this will not affect the holders of the Indiana mortgage debts. A road thus severed into two independent portions may be of little value to the owners of either. The State of Ohio encouraged the consolidation of connecting lines by very liberal statutory provisions. The same statute the Ohio court has construed as conferring a unit lien on the whole of said road in favor of Compton. Now, should that statute be construed so as to permit Compton to ignore the unit character of his lien and thus bring about a severance of the roads which were united by the same act which conferred the lien? Under such a lien, upon property of the description of that involved, the lienor should be held to an entire redemption of all the property on which his lien rests.

8. But it may finally be said that the same act of consolidation which gave rise to the lien asserted by Compton, gave to the Indiana divisional bondholders a similar lien on the entire property of the Toledo & Wabash Railway Company which had been transferred by the consolidation to the Toledo, Wabash and Western Railway Company, and that therefore they have the right to object to any redemption which does not provide for their payment, or does not admit them to a participation in the benefits of the lien. This has not been answered except by an insistence that the purchaser cannot on this appeal represent those bondholders and is not the equitable assignee of the rights of the Indiana bondholders by virtue of the Ohio decree of foreclosure; and by the further suggestion, that if the Indiana mortgagees were parties at all to the Ohio foreclosure suit, they are estopped to set up any such lien, having neglected to assert it in the foreclosure case.

It is a mistake to say that the Indiana mortgagees were not parties to this cause. The amended and supplemental bill filed by Jessup and Knox set out each of the four prior mortgages and made the trustees parties thereto, "in order that a decree might be made herein settling the rights and equities of the said several classes of bondholders and ordering a sale of said property and equipments free and clear of all liens of said underlying mortgages."

The property covered by the Knox and Jessup mortgage included the entire line in the three States of Ohio, Indiana and Illinois, and the sale sought was a unit sale of the entire line, and such was the final decree of foreclosure. Like bills were filed in each jurisdiction, and the Ohio decree is identical with the Indiana de-

cree. That bill also made S. Fisher, Edmond Pepper and J. H. Purdy defendants, "as a committee representing certain holders of first-mortgage bonds of the Toledo and Illinois Railway Company, and Lake Erie, Wabash and St. Louis Railroad Company," these being the original mortgagor companies.

76 The cross-bill of Humphrey and Lindley, trustees under a blanket mortgage subsequent to that of Jessup and Knox, likewise made the Farmers' Loan & Trust Company and James F. Joy, *as trustees under both the Ohio and Indiana mortgages, defendants.* It is true that neither of the trustees under the Indiana mortgages filed original or cross bills praying foreclosure of the Indiana mortgage by the Ohio court. That is immaterial, for the other complainants and cross-complainants did bring them before the court in their character as trustees under both sets of mortgages and did obtain a decree foreclosing both the Indiana and Ohio mortgages as well as every other mortgage on the entire line extending through three States. That decree of the circuit court of the United States for the northern district of Ohio was executed and the entire line of railroad then owned by the Wabash, St. Louis & Pacific Railway Company *was sold as a unit,* and the commissioner directed to make a conveyance accordingly. It is said that this Ohio decree selling the road as a unit is valid only to the extent of the property within the jurisdiction. In other words, the insistence is, that the decree of foreclosure, although confirmed by being subsequently entered within every other jurisdiction, was valid in each only so far as the mortgaged property was within the jurisdiction. Having thus divided and distributed the decree it is said that it must follow, that the purchaser's title involved on this appeal is the title which he obtained under the Ohio decree to the Ohio division, and nothing in this controversy involves its title to the Indiana bonds as equitable assignee. If this be so, with all of its inferences, it would seem that the court had been engaged in a wholly fictitious controversy. How is the court to determine the extent to which Compton must redeem if that is his only remedy unless the parties interested in that question are before the court *in propria persona* or by representation? The Wabash Railway Company was not the purchaser at foreclosure sale, but is the assignee of the purchasers. It was regularly admitted on its own application as a defendant, with leave "to take advantage of and use as its own all the allegations in the original, amended or supplemental pleadings of complainants filed in this cause or in the pleadings of the Farmers' Loan & Trust Company and James F. Joy, relating to or bearing on the claims of said Compton." Thus it is before the court not by reason alone of its attitude as assignee of the purchasers, but as a full and formal party admitted for the express purpose of contesting the relief sought by Compton. It is true that he sought for a *sale* of the Ohio division only and had no prayer for redemption, entire or partial. The court, however, construed its power under the saving clause in the decree of foreclosure as reserving jurisdiction over him and his lien so that it might give him such relief as he should show himself equitably entitled to. His prayer for general relief has also

been construed as including redemption, and to this I agree. Being a formal defendant the Wabash Railway Company may rely upon any defense which goes to Compton's right
77 to a separate redemption. As the owner of the Indiana division under an imperfect foreclosure, only because Compton's lien is unforeclosed, it is the equitable assignee of the Indiana mortgage debts. Whether it became so under the Ohio decree or under the Indiana foreclosure only, is absolutely immaterial. I for any of the reasons which I have before stated, Compton should not be accorded separate redemption of the Ohio mortgages, it, as the owner of the Indiana division under such defective foreclosure, and of the Indiana bonds as a consequence, is entitled to resist a partial redemption, both as successor to the successive mortgagor corporations and equitable assignee of the Indiana bonds. But I utterly dissent from the conclusion of Judge Taft that the foreclosure sale was in form a unit sale but in fact a sale by fragments. The bids on separate divisions were never accepted, and the bid reported and confirmed was one for the line as an entirety. By what authority were the fragmentary bids rejected and the bid for the property as a unit accepted if the decree of sale was invalid, except so far as the property was within the territorial jurisdiction of the Ohio court? If that theory be sound there has been no sale at all of any part of the road. On that theory what has become of the franchise? That was a unit incapable of being split up and distributed among the fragments. Who has obtained the rolling stock and personal property? The purchaser of the Indiana division, or the purchaser of the Ohio division? Under which decree did it pass? Or if it, too, was transferred in fragments, on what basis was the division made? The doctrine of Muller *v.* Dows, 94 U. S. 444–449, lends no support to the idea of distributing the decree of sale. The Ohio court had before it the mortgagor corporations, or those who had succeeded to their title and rights of redemption, as well as every trustee under both divisional and blanket mortgages. It could have required all the parties to join in a conveyance of the entire line and thus confirm its decree for a unit sale and this would confessedly have passed the entire title, though the suit had been filed in a single jurisdiction. A modern method of accomplishing the same end has grown into favor, and that is, to have identical decrees entered in each jurisdiction. The legal effect of this is to confirm the decree ordering the sale of the line within each jurisdiction as one entire line. The result of such confirmation is to make a unit instead of a fragmentary sale, and the title of the purchaser to the whole property is complete under each identical decree. The same end is reached that would have resulted from a decree requiring a deed from all having any interest in any part of the line. This method of selling a railroad lying within two or more States obviates many of the objections to the plan adopted in Muller *v.* Dows, and makes it possible to make a unit sale where either the mortgagor or some trustee have not personally appeared and could not be required to make a deed. It is believed

to be a plan now generally adopted, the operativeness of which I have never before heard questioned.

78 It is next said that the Indiana mortgagees have waived the benefit of the Ohio statutory lien on the Ohio division by failing to set it up in the foreclosure cases. By this must be meant that this additional security was not asserted in the original pleadings, for its assertion now is an assertion of the claim in the foreclosure proceedings, so soon as it became material to claim the benefit of it. The question as to the existence of any such lien had been decided adversely to the lienors by the Supreme Court of the United States in the case of Ham *v.* Wabash, St. Louis & Pacific Railway Company, reported in 114 U. S., 587, and decided in 1885. That was supposed to be a class suit and to be conclusive upon all who might have asserted such a lien. The foreclosure proceedings were begun in Feb., 1887. During the pendency of these suits the Ohio supreme court decided the Compton case and refused to follow the Ham decision in the construction of the Ohio statute. This decision was made in 1888. Subsequently Compton was made a defendant as a person claiming some interest or lien upon the property sought to be sold free from all incumbrance. He had not answered or filed any pleadings when the foreclosure decree was made and a sale ordered reserving his rights. When he did plead and asserted this lien it is found not to be a lien exclusively for his benefit, but one which inured to the equal benefit of all who are unpaid creditors of the Toledo & Wabash Railway Company. Though he sought to avail himself of it for his exclusive benefit, yet this court is agreed in holding that the lien must inure in behalf of all within the benefits of the statute. The contention that the Indiana bondholders are entitled to share in the benefits of this lien and of Compton's redemption, is presented not in a new or subsequent suit nor in a collateral proceeding, *but in the very suit in which the existence of a class lien is declared and a remedy for its enforcement is to be awarded.* When the circuit court refrained from deciding any question involved in Compton's assertion of this lien and reserved jurisdiction to thereafter adjudge his rights in their relation to all the other parties to the proceeding, *it necessarily operated as a reservation of the rights of all others who were defendants who might have an interest under the class lien asserted by him.* If when the foreclosure sale had been made it had appeared that in the *pro rata* of the unit price assignable to the Indiana division, there was a deficiency in the fund applicable to the Indiana divisional bonds and an excess in the fund assignable to the Ohio division, after paying the Ohio bonds, the question would have arisen as to the rights of the unpaid Indiana mortgagees in this excess. No such excess appeared, and no such question was, therefore, natural. But if the Ohio division is to be separately redeemed by Compton for the benefit of all entitled to share therein, the question of who are the beneficiaries under the lien does become relevant. No redemption, entire or partial, can be had that does not involve, first, an adjudication that the foreclosure was defective and the purchaser's title sub-

ject to redemption; second, a determination of the rank
79 and rights of the statutory lienors in relation to the rank and rights of mortgagees both junior and senior to the lien under which redemption is to be had; and finally, an ascertainment of the beneficiaries under the redemption. Now, if the purchaser's title is defective, it is entitled to stand as the equitable assignee of the debts secured under the mortgages foreclosed as well as of the security for those debts. If Compton succeeds in establishing that the Indiana bonds have a double security, the second being a result of the successful assertion of a lien upon the Ohio division subordinate only to the Ohio divisional mortgages, then the equitable assignee of the Indiana bonds is entitled to the benefit of this second security. It may be accountable to the mortgagees for all it shall realize after reimbursing its own expenditure, but that is a matter which does not concern Compton. In any view of the case I am clearly of opinion that if Compton is accorded a separate redemption of the Ohio property it must enure to the equal benefit of the unpaid second Indiana mortgagees.

9. If I am right in regarding Compton's remedy as redemption, and that in determining what he shall redeem the remedy accorded him by the Ohio court cuts no figure, then I think it must follow that the Indiana decree, disallowing separate redemption and requiring him to redeem all or none, is a conclusive adjudication of the question, and may be relied upon to sustain the motion to dismiss or affirm. The parties and the subject-matter were the same; that court had jurisdiction over both through the power reserved by the Indiana decree over Compton and the purchaser.

If this court reviewing the decree of the circuit court for the northern district of Ohio, has the authority to consider the question involved in the insistence for an entire redemption, then the Indiana circuit court could under like pleadings and a like reservation of jurisdiction over Compton's lien, grant him proper equitable relief; this failure to appeal from the decree requiring him to redeem all or none is conclusive as an estoppel.

Finally, I think that whether Compton redeems the entire road covered by his lien or a part thereof, the purchaser is not subject to an accounting for rents and profits.

The liability to an account depends upon whether the purchaser was in possession as first mortgagee.

"In order," says Mr. Pomeroy, "that these special rights and liabilities may arise from his possession, it must be a possession taken and held by him as mortgagee."

Pom. Eq. Juris., sec. 1215.

Jones on Mortgages, 1114 to 1121.

The liability for an accounting is only to the mortgagor
80 or a subsequent mortgagee, and it proceeds upon the theory that the possession was as trustee for the mortgagor, and therefore accountable for rents in equity.

Pom. Eq. Juris., 1218.

Jones on Mortgages, 1115.

The mortgagor in possession is therefore not accountable while suffered to remain in possession by a mortgagee. Neither would a mortgagee, who entered under a purchase of the mortgagor's equity of redemption, be accountable to a junior mortgagee.

Gray *v.* Nelson, 77 Iowa, 63.

Nor could a senior mortgagee call a junior mortgagee to an accounting, for he has no right to redeem the junior incumbrancer, and therefor- no right to hold him to an accounting. A junior mortgagee in possession would be responsible alone to the mortgagor, or to a lienor junior in rank.

Jones on Mortgages, section 1116.

If, therefore, the purchaser's possession was as purchaser or assignee of the mortgagor, or as a junior incumbrancer, it is not liable to an accounting to Compton. In fact, its possession was under a judicial foreclosure which operated to bar and foreclose mortgages both junior and senior to the lien of Compton, and to forever bar the mortgagor's equity of redemption. That decree was not void, for it expressly foreclosed all those rights, titles and equities, *subject to the lien of Compton, if any he had.* Where the purchaser's title and possession depends on a void decree it has been held to operate as an *assignment* of the mortgage sought to be foreclosed, and in such case the purchaser's possession is that of a mortgagee by assignment in possession and accountable to one entitled to redeem.

Jones on Mortgages, sec. 1118.

Most of the cases in which a senior mortgagee has been held liable to an accounting, have either been because possession was taken before foreclosure or where the mortgagor had not been barred. If the purchaser in possession has failed to obtain the mortgagor's title for any reason, he is liable to account to the mortgagor when he seeks redemption, or to a junior incumbrancer. All that is said in Russell *vs.* Southard, 12 How., 153, concerned an accounting to the mortgagor and a redemption by him.

The purchaser's title is perfect save in so far as Compton's lien is to be regarded as unforeclosed. Holding such a title, it cannot be said that the foreclosure sale operated *only* as an assignment of the mortgages foreclosed. Its effect was to confer an absolute legal title subject to an intermediate lien, the place of which was to be determined with regard to its relation to other lienors.

Jones on Mortgages, sec. 1395.

81 The cases of Catterlin *vs.* Armstrong, 79 Ind., and Renard *vs.* Brown, 7 Nebraska, 449, are upon the very point now considered. The reasoning is sound and entirely meets my approval. The decree on this point should be affirmed, as well as in all other respects, save only as so modified as to hold that Compton's

redemption must enure to the benefit of all other creditors of the same class.

A true copy.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: Case No. 15,979. U. S. circuit court of appeals, sixth circuit. Term No., 689. James Compton, appellant, *vs.* James R. Jesup & Edward H. Dixon, trustees, *et al.* Certificate. Filed August 5th, 1895.

Circuit Court of the United States,

Southern District of Illinois,
District of Indiana,
Northern District of Ohio.

JAMES R. JESUP AND EDWARD H. DIXON,
COMPLAINANTS,

vs.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, ET AL., DEFENDANTS.

DECREE

Allowed March 23, 1889.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, THE TWENTY-THIRD DAY OF MARCH, 1889.

Present: The Honorable WALTER Q. GRESHAM, Circuit Judge.

JAMES R. JESUP and EDWARD H. DIXON, *Complainants*,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Solon Humphreys and Thomas E. Tutt, as Receivers of the said Wabash, St. Louis and Pacific Railway Company, Solon Humphreys, The Farmers Loan and Trust Company, Alexander M. White, Henry H. Warden, John T. Terry, Alfred T. White, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Welles, The Central Trust Company of New York as substituted trustee, The St. Louis, Iron Mountain and Southern Railway Company, The Missouri Pacific Railway Company, Daniel A. Lindley, The Central Trust Company of New York, James Cheney, Jay Gould, A. Lawrence Hopkins, S. Fisher Johnson, Edward Popper, J. Harsen Purdy, Edwin Parsons, Maximilian Herschel, The Mercantile Trust Company, John McNulta as receiver of the property formerly of the Wabash, St. Louis and Pacific Railway Company, lying east of the Mississippi river, James Compton, The Metropolitan National Bank, David G. Legget, John N. A. Griswold, *Defendants.*

In Chancery. Consolidated Cause.

This cause having come on in due course to be heard upon the pleadings and proofs of the respective parties and

on all the papers and proceedings herein, and on the report of Bluford Wilson and A. J. Ricks, the special masters heretofore appointed herein, which report bears date and was filed on the first day of February 1889, and on the exceptions filed thereto, and it appearing to the court that all the parties hereto except the defendants Jay Gould and A. Lawrence Hopkins have been duly served with process, or have duly entered their appearance herein, or have been notified of the pendency of this cause by personal service without the district as heretofore ordered by the court, more than thirty days since, and the same having been duly argued by counsel, and due deliberation having been had,

IT IS ORDERED AND ADJUDGED, that the said exceptions be and the same hereby are overruled, and that the report of the said special masters be and the same hereby is in all things approved and confirmed.

And the court being fully advised in the premises doth hereby find

I.

1. that the Toledo and Illinois Railroad Company was a corporation duly incorporated under and by virtue of the laws of the state of Ohio on or about the twentieth day of April 1853, for the purpose of constructing, owning and maintaining a railroad from the city of Toledo in said state of Ohio, in a direction towards the town of Fort Wayne in the state of Indiana to a point on the west boundary line of said state of Ohio, in the township of Harrison, in the county of Paulding, in said state of Ohio.

2. that thereafter the said Toledo and Illinois Railroad Company made and executed its nine hundred bonds for one thousand dollars each, bearing date the first day of August 1853, payable on the first day of August 1865, with

interest at the rate of seven per centum per annum, payable semi annually, on presentation and surrender of the coupons thereto attached as they should severally become due.

3. that to secure the payment of the principal of the said bonds and of the interest thereon as the same should from time to time become due, the said Toledo and Illinois Railroad Company duly made executed and delivered to the Farmers Loan and Trust Company, as trustee, a mortgage or deed of trust bearing date the eighth day of September 1853, and thereby conveyed to the said trustee, upon the trusts therein stated, all the property of the said railroad company, that is to say, their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be furnished or paid for with the above described bonds, and the bridges, viaducts culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of said railroad company of, in, to or concerning the same.

4. that the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated, and became and is a first and prior lien on all the railroad property, equipments and franchises therein mentioned and described, and that all of the said bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value;

5. that the time for the payment of the principal of the said bonds was thereafter, at maturity, extended to the first day of August 1890, at the same rate of interest;

6. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Toledo and Illinois Railroad Company, failed to pay the interest maturing on said bonds on the first day of February 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due February 1, 1885, and August 1, 1885, and February 1, 1886, and August 1, 1886, have since been paid by the receivers, appointed as hereinafter stated, leaving unpaid all subsequent coupons;

7. that there is now owing and unpaid for principal and interest upon said bonds, together with interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of one million and sixty-six thousand nine hundred and fifty dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree, and that such sum is independent of, and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds;

8. that the holders of more than one-half of the bonds outstanding and secured by said mortgage by notice in writing have required the said trustee to proceed to enforce the security provided by said mortgage, and to foreclose the same, and to collect the principal and interest due upon said bonds.

II.

The court doth further find :

1. that the Lake Erie, Wabash and St. Louis Railroad company was a corporation duly organized and incorporated under and by virtue of the laws of the State of Indiana on or about the twenty-fourth day of June 1852, for the construction, owning and maintaining of a line of railroad, the eastern terminus thereof being a point on the east line of Allen or DeKalb County in said State of Indiana, thence running down the valleys of Little and Wabash rivers, and passing through the counties of DeKalb, Allen, Whitley, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, Warren and Vermillion, or as many of them as may be necessary, all in the State of Indiana, on the most eligible route and terminating at some point on the west line of the State of Indiana in the general direction of Danville, Illinois ;

2. that thereafter the said Lake Erie, Wabash and St. Louis Railroad Company duly made and executed its twenty-five hundred bonds for one thousand dollars each, bearing date the first day of August 1853, payable on the first day of August 1865, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of February and August in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due ;

3. that thereafter the said Lake Erie, Wabash, and St. Louis Railroad Company, in order to secure the payment of the principal of the said bonds and of the interest thereon, as the same should from time to time become due, duly made, executed and delivered to the said Farmers Loan and

Trust Company, as trustee, a mortgage or deed of trust bearing date on said first day of August 1853, and thereby conveyed to the said trustee, upon the trusts therein specified, its road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be purchased and paid for with the above described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights and privileges of the said railroad company of, in, to or concerning the same;

3. that the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated, and became and is a first and prior lien on all the railroad property, equipment and franchises therein mentioned and described, and that all of the said bonds thereby secured are now outstanding in the hands of divers persons and corporations, owners and holders thereof for value;

4. that the time for the payment of the principal of the said bonds was thereafter, at maturity thereof, extended to the first day of August 1890, at the same rate of interest;

5. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated of the said Lake Erie, Wabash and St. Louis Railroad Company, failed to pay the interest maturing on said bonds on the first day of February 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due February 1, 1885 and August 1, 1885

and February 1, 1886 and August 1, 1886 have since been paid by the receivers appointed as hereinafter set forth, leaving due and unpaid all subsequent coupons;

6. that there is now owing and unpaid for principal and interest upon said bonds and interest upon the unpaid installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree, and that such sum is independent of, and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds;

7. that the holders of more than one-half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustee to proceed to enforce the security provided by said mortgage, and to foreclose the same, and to collect the principal and interest due upon said bonds.

III.

The court doth further find and adjudge:

1. that thereafter, and on or about the twenty-fifth day of June 1856, the said Toledo and Illinois Railroad Company consolidated under the laws of the said states of Ohio and Indiana with the said Lake Erie, Wabash and St. Louis Railroad Company, the consolidated corporation being known as the Toledo, Wabash and Western Railroad Company;

2. that thereafter, under decrees of the Circuit Court of the United States for the Northern District of Ohio, and of

the Circuit Court of the United States for the District of Indiana, the property of the said consolidated corporation was sold, under foreclosure of certain junior mortgages, to Azariah Boody; that the said purchaser thereafter conveyed the said property, that portion thereof situate within the State of Ohio, and formerly owned by the Toledo and Illinois Railroad Company, to the Toledo and Wabash Railroad Company, a corporation organized as hereinafter stated, and that portion thereof situate within the State of Indiana, and formerly owned by the Lake Erie, Wabash and St. Louis Railroad Company, to the Wabash and Western Railway Company, a corporation also organized as hereinafter stated.

IV.

The court doth further find:

1. that the Toledo and Wabash Railroad Company was a corporation organized under and by virtue of the laws of the State of Ohio on or about the first day of July 1858; and that to said corporation was conveyed the railway property, equipments and franchises formerly of the Toledo and Illinois Railroad Company situate in said state;

2. that thereafter and on or about the fifteenth day of October 1858, the said Toledo and Wabash Railroad Company duly made and executed its bonds to the amount of one million dollars of the denomination of two hundred and fifty, five hundred and one thousand dollars each, bearing date on that day, payable on the first day of November 1878, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due.

3. that to secure the payment of the said bonds and of the interest thereon as the same should from time to time mature and be due and payable, the said Toledo and Wabash Railroad Company duly made, executed and delivered to Edwin D. Morgan, as trustee, a mortgage or deed of trust bearing date on said fifteenth day of October 1858, and thereby conveyed to the said trustee, upon the trusts therein stated, its railroad made and to be made, the right of way and all lands occupied thereby, together with superstructures, depots, depot grounds, and all buildings erected or to be erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessories of the said railroad company in the state of Ohio and all the rolling stock, material, machinery, furniture and equipments of said road, being the same property described in the deed of Matthew Johnson, marshal and special master commissioner to A. Boody, dated October 8th. one thousand eight hundred and fifty-eight, and which was conveyed by said Boody to said railroad company;

4. that the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated and became and is a lien on all the railroad property, equipment and franchises therein described, subject only to the prior lien of the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company, as hereinbefore mentioned, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value;

5. that the time for the payment of the principal of said bonds was thereafter, at maturity, extended to the first day of May 1893, at the same rate of interest;

6. that the said Edwin D. Morgan, trustee under said mortgage or deed of trust, departed this life on or about the

fourteenth day of February 1883, and the defendant James F. Joy has been duly appointed his successor in the trusts thereby created;

7. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated of said Toledo and Wabash Railroad Company, failed to pay the interest maturing on said bonds on the first day of May 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof;

8. that there is now owing and unpaid for principal and interest upon said bonds and interest upon said several installments of interest from the dates at which they respectively became due, to the first day of February 1889, the sum of one million three hundred and thirty-one thousand one hundred dollars, together with interest on said sum from the first day of February 1889 to the date of this decree, and that such sum is independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

V.

And the court doth further find:

1. that the Wabash and Western Railway Company was a corporation duly organized and incorporated under and by virtue of the laws of the State of Indiana, on or about the fifteenth day of July 1858, and that to said corporation was conveyed the railway property, equipments and franchises formerly of the Lake Erie, Wabash and St. Louis Railroad Company in said state;

2. that thereafter and on or about the fifteenth day of October 1858, the said Wabash and Western Railway Company duly made and executed its bonds to the amount of one million five hundred thousand dollars, of the denomination of one hundred, five hundred and one thousand dollars each, bearing date on said day, payable on the first day of November 1878, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year on presentation and surrender of the coupons thereto attached as they should respectively become due;

3. that to secure the payment of the said bonds and of the interest thereon, as the same should from time to time accrue and become due, the said Wabash and Western Railway Company duly made, executed and delivered to Edwin D. Morgan, as trustee, a mortgage or deed of trust, bearing even date with said bonds, and thereby conveyed to said trustee, upon the trusts therein stated, its railroad made and to be made, the right of way and all the land occupied thereby, together with all the superstructure, depots, depot grounds and buildings erected or to be erected thereon, and the rail, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges and franchises of the said railway company in the State of Indiana, and all the rolling stock, materials, machinery, furniture and equipments of the said road; being the same property described in the deed of John L. Robinson, marshal and commissioner, to A. Boody, dated October fifth, eighteen hundred and fifty-eight, and conveyed by A. Boody to the said railway company;

4. that the said mortgage was thereafter duly recorded in all the counties through which the said railroad ran or in which it was situated, and became and is a lien on all the railroad property, equipment and franchises therein described, subject only to the prior lien of the said mortgage

executed by the Lake Erie, Wabash and St. Louis Railway Company to the Farmers Loan and Trust Company as hereinbefore recited, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value:

5. that the time for the payment of the principal of the said bonds was thereafter at maturity extended to the first day of May 1893, at the same rate of interest;

6. that the said Edwin D. Morgan, trustee under the said mortgage or deed of trust, departed this life, as hereinbefore found, on or about the fourteenth day of February 1883, and that since his death the defendant James F. Joy has been appointed his successor in the trusts thereby created;

7. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Wabash and Western Railway Company, failed to pay the interest maturing on said bonds on the first day of May 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof;

8. that there is now owing and unpaid for principal and interest upon said bonds and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of one million nine hundred and ninety-six thousand six hundred and fifty dollars together with interest on said sum from the said first day of February 1889 to the date of this decree, and that such sum is independent of, and in addition to, the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed, of scrip certificates and funded debt bonds.

VI.

And the court doth further find:

1. that thereafter and on or about the third day of November 1858, the said Toledo and Wabash Railroad Company duly consolidated under the laws of the said states of Ohio and Indiana with the said Wabash and Western Railway Company, the consolidated company being known as the Toledo and Wabash Railway Company.

VII.

And the court doth further find:

1. that the Illinois and Southern Iowa Railroad Company was a corporation duly incorporated by act of the legislature of the state of Illinois on or about the twelfth day of February 1857, with power and authority to survey, locate, relocate, establish, build, maintain, equip and operate a railroad from the city of Warsaw and from the easterly shore of the main channel of the Mississippi river opposite the city of Keokuk at Hamilton in the county of Hancock, Illinois, by way of Carthage in said county to such point on the line of the Toledo and Quincy railroad at or between Camp Point and a point at or near Clayton as might be found most expedient and practicable for a connection with the line of said Toledo and Quincy railroad;

2. that the said Illinois and Southern Iowa Railroad Company thereafter and on or about the first day of March, 1862, duly made and executed its bonds to the amount of three hundred thousand dollars, two hundred of said bonds being of the denomination of one thousand dollars each, and two hundred thereof being of the denomination of five hundred dollars each, payable on the first day of August, 1882,

with interest thereon from and after the first day of March 1862, at the rate of seven per cent. per annum payable semi-annually on the first days of February and August in each year on presentation and surrender of the coupons thereto attached as they should respectively become due;

3. that to secure the payment of the principal of said bonds together with the interest thereon as the same should accrue and become due and payable, the said Illinois and Southern Iowa Railroad Company duly made, executed and delivered to John N. A. Griswold, James R. Jesup and Lucien Tilton, as trustees, a mortgage or deed of trust bearing even date with said bonds, and thereby conveyed to said trustees upon the trusts therein stated all the lands, tenements, roadbed, right of way, depot and station grounds, and houses, turnouts, switches and easements, ties, bridges, iron engines, tenders, cars, tools, machinery and materials, wood, fuel, furniture and property of every kind, name and nature whatsoever which the said railroad company then owned or might thereafter acquire or own or have any interest in, for, on, or connected with its road, built or to be built, being and situate, between the town of Carthage, in Hancock County, and the junction with the Quincy and Toledo Railroad at or near Clayton, in Adams County, Illinois, the same being a distance of about thirty miles. Also all contracts, leases and rights which said railroad company then had or might thereafter acquire with or against any other railroad or other corporation, and especially the lease then owned by said railroad company from the Mississippi and Wabash Railroad Company granting the joint use of all its road from Carthage to the Mississippi river, opposite Keokuk, Iowa, and to said town of Warsaw, for the term of fifty years from May twenty-fifth, eighteen hundred and fifty-nine, which said lease is duly executed and of record in said county of Hancock and state of Illinois, and also any lease or contract

then made or which might at any time thereafter be made by said railroad company with other parties respecting the ferry across the Mississippi river at Keokuk, and the right to use the same; also all unpaid subscriptions to the capital stock, debts, books, vouchers, evidences of debt, tickets, hand bills and all other papers which might then or thereafter be due or belong to said railroad company, together with all the rights, privileges, immunities and franchises, and all its receipts, earnings and assets from every source and of every nature whatever;

4. that the said mortgage was thereafter duly recorded in all the counties in said state of Illinois through which the said railroad ran or in which it was situated, and became and is a first and prior lien on all the railway property, equipments and franchises therein mentioned and described, and that all the said bonds were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value;

5. that the time for the payment of the principal of the said bonds was thereafter, at maturity, extended to the first day of August 1912, the rate of interest being reduced to six per centum per annum;

6. that the said Lucien Tilton, one of said trustees, thereafter died;

7. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation, as hereinafter stated, to the said Illinois and Southern Iowa Railroad Company failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons

due August 1, 1884, and February, 1, 1885 and August 1, 1885, and February 1, 1886 and August 1, 1886, have since been paid by the receivers appointed as hereinafter stated, leaving unpaid all subsequent coupons;

8. that there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of three hundred and forty-seven thousand seven hundred dollars, together with interest on said sum from the said first day of February 1889, to the date of this decree, and that such sum is independent of, and in addition to, the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds;

9. That the holders of more than one half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustees to proceed to enforce the security provided by said mortgage for the principal and interest due upon said bonds.

VIII.

And the court doth further find:

1. that the Great Western Railroad Company of 1859 was a corporation duly incorporated by act of the legislature of the State of Illinois on or about the twenty-ninth day of January 1859, with the rights, powers and franchises usually possessed by railroad corporations and all the privileges, powers, rights and franchises at any time theretofore possessed by the Great Western Railroad Company;

2. that thereafter and on or about the twenty-fifth day of May 1863 the said Great Western Railroad Company of 1859, made and executed its twenty-five hundred bonds, bearing date on that day for one thousand dollars each, payable on the first day of August 1888 with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year on presentation and surrender of the coupons thereto attached as they should severally become due;

3. that to secure the payment of the principal of the said bonds together with the interest thereon, as the same should accrue and become due and payable the said Great Western Railroad Company of 1859, duly made, executed and delivered to George Griswold, Alexander M. White and Henry H. Warden, as trustees, a mortgage or deed of trust, bearing even date with the said bonds and thereby conveyed to the said trustees upon the trusts therein specified all the right of way and railroad of the said railroad company extending in the State of Illinois from Naples and Meredosia as its western termini through Springfield and Decatur to the boundary line between the states of Illinois and Indiana, as then used, or as at any time thereafter the said road might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices, and all things real and personal then used or that thereafter might be used by the said railroad company in connection with the said railroad, and everything appurtenant thereto, and all the franchises, privileges and chartered, or other rights of the said The Great Western Railroad Company of 1859;

4. that the said mortgage was thereafter recorded in the various counties of the said state of Illinois, through which

the said railroad ran, or in which it was situated, and became and is a first and prior lien, except as hereinafter stated, upon all the railway property, equipments and appurtenances therein mentioned and described, and that all of the bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value.

5. that the said bonds were executed and delivered to take up and pay and satisfy certain prior liens theretofore existing upon the property of said company, viz.: two certain issues of bonds of the Great Western Railroad Company, the predecessor corporation of said The Great Western Railroad Company of 1859, amounting to one million dollars and one million three hundred and fifty thousand dollars respectively; that all of the said bonds last mentioned were so taken up and satisfied except four, for the sum of one thousand dollars each, with interest at ten per centum per annum, payable semi-annually, which are still outstanding; that of said four bonds, one has been produced and proved before the masters in this cause; that the same is secured by a mortgage to The Farmers Loan and Trust Company as trustee, bearing date the fifteenth day of March 1853, and which said mortgage to the extent of the principal and interest of the bonds secured thereby outstanding as aforesaid, and not exceeding the sum of four thousand dollars and interest, is a lien on the railway property, equipments and franchises of the said The Great Western Railroad Company of 1859, prior to the lien thereon of the said mortgage to the said Griswold, White and Warden;

6. that the said George Griswold, one of the said trustees, thereafter departed this life;

7. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated, of said

The Great Western Railroad Company of 1859, failed to pay the interest maturing on said bonds on the first day of August 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of maturity thereof; that the coupons due August 1, 1884 and February 1, 1885, and August 1, 1885, and February 1, 1886 and August 1, 1886, have since been paid by the receivers, appointed as hereinafter set forth, leaving unpaid all subsequent coupons;

8. that there is now due, owing and unpaid upon the said bond produced before the masters, executed by the Great Western Railroad Company, to the Farmers Loan and Trust Company, as trustee, for principal and interest, the sum of two thousand nine hundred and seventy-five dollars and sixty-two cents, together with interest thereon from the first day of February 1889, to the date of this decree;

9. that there is now due and owing and unpaid for principal and interest upon said bonds of the Great Western Railroad Company of 1859 and interest upon the several installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February 1889, to the date of this decree, and that such sums are so due independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

10. that the holders of more than one-half of the bonds outstanding and secured by said mortgage, by notice in writing, have required the said trustees to proceed to enforce

the security provided by said mortgage and to foreclose the same and to collect the principal and interest due upon said bonds.

IX.

And the court doth further find:

1. that thereafter and on or about the eleventh day of May 1865, the said the Great Western Railroad Company of 1859, duly made and executed its twenty-five hundred other bonds, each for the sum of one thousand dollars, bearing date on said day, payable on the first day of May, one thousand eight hundred and ninety-three, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of May and November in each year, on presentation and surrender of the coupons thereto attached as they should severally become due;

2. that to secure the payment of the principal of the said bonds, together with the interest thereon, as the same should mature and become due, the said The Great Western Railroad Company of 1859 duly made, executed and delivered to Solon Humphreys and James R. Jesup, as trustees, a mortgage or deed of trust, bearing date the said eleventh day of May 1865, and thereby conveyed to the said trustees upon the trusts therein stated, all the right of way and railroad of the said railroad company, extending in the state of Illinois, from Naples and Meredosia as its western termini, through Springfield and Decatur to the boundary line between the states of Illinois and Indiana, as then used or as at any time thereafter the said road might be used; together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turn tables engines, cars, machinery tools, rolling stock, lots, lands, buildings, offices, and all things real and personal then owned or used or that thereafter might be

owned or used by the said railroad company in connection with the said railroad, and everything appurtenant thereto, and all the franchises, powers, privileges and chartered or other rights of the said Great Western Railroad Company of 1859;

3. that the said mortgage was thereafter duly recorded in the various counties in the said state of Illinois through which the said railroad ran or in which it was situated, and became and is a lien upon the railway property, equipments and franchises therein mentioned and described subject only to the prior lien of said mortgage executed by the Great Western Railroad Company to the extent of the principal and interest of the four bonds secured thereby outstanding as hereinabove set forth, and to the prior lien of the said mortgage executed by the said The Great Western Railroad Company of 1859 to the said Griswold, White and Warden, as trustees;

4. that the said Solon Humphreys thereafter duly resigned and discharged himself of the trusts created by the said mortgage;

5. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated of the said The Great Western Railroad Company of 1859, failed to pay the interest maturing on the said bonds on the first day of May 1885, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof;

6. that there is now owing and unpaid for principal and interest upon said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of three millions three hundred and twenty-seven

thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February 1889, to the date of this decree and that such sum is independent of, and in addition to, the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds;

7. that the holders of more than a majority in value of the bonds outstanding and secured by said mortgage, by notice in writing, have declared the principal of said bonds to be due and payable, and have required the said trustee to proceed in accordance with the terms of said mortgage, to foreclose the same.

X.

And the court doth further find:

1. that the Quincy and Toledo Railroad Company was a corporation duly incorporated under and by virtue of an act of the legislature of the state of Illinois, on or about the thirty-first day of January 1857, and authorized and empowered to locate, construct and finally complete and put in operation a railroad from the east end of the depot ground of the Northern Cross Railroad Company, at Camp Point, in the county of Adams to the east side of the Illinois river, at or near Naples or Meredosia, and so as to connect the same with the track of the Great Western Railroad of Illinois;

2. that thereafter and on or about the twenty-ninth day of May 1865, the said Quincy and Toledo Railroad Company made and executed its five hundred bonds, each for the sum of one thousand dollars, bearing date on that day, payable on the first day of November 1890, with interest thereon at the rate of seven per centum per annum, payable semi-

annually on the first days of May and November of each year, on presentation and surrender of the coupons thereto attached, as they should severally become due;

3. that to secure the payment of the principal of said bonds and of the interest thereon, as the same should mature and become due and payable, the said Quincy and Toledo Railroad Company made, executed and delivered to John T. Terry as trustee, a mortgage or deed of trust, bearing date on said twenty-ninth day of May 1865, and thereby conveyed to said trustee, upon the trusts therein specified, all the right of way and railroad of the said railroad company, extending in the state of Illinois from Clayton to the west side of the Illinois river, opposite Meredosia, as then used or as at any time thereafter the said road might be used; together with all embankments, bridges, turnouts, side-tracks, structures, water tanks and fixtures, engine or other houses, depots, turntables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all things real and personal now owned or used or that thereafter might be owned or used by the said railroad company in connection with the said railroad and everything appurtenant thereto, excepting that part of the road west of said Clayton, and all the franchises, powers, privileges and chartered or other rights of the said Quincy and Toledo Railroad Company;

4. that the said mortgage or deed of trust was thereafter duly recorded in the various counties through which the said railroad ran, or in which it was situate, and became and is a first and prior lien upon all the railway property, equipments and franchises therein mentioned and described, and that all of said bonds thereby secured were issued and are now outstanding in the hands of divers persons and corporations, holders thereof for value;

5. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter set forth to

said Quincy and Toledo Railroad Company, failed to pay the interest maturing on said bonds on the first day of November 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due November 1, 1884, and May 1, 1885, and November 1, 1885, and May 1, 1886, and November 1, 1886, have since been paid by the receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons;

6. that there is now owing and unpaid for principal and interest upon said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of five hundred and eighty-two thousand nine hundred and fifty dollars, together with interest on said sum from the said first day of February 1889, to the date of this decree, and that such sum is independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

7. that the holders of more than one-half of the said bonds outstanding and secured by said mortgage by notice in writing have required the said trustee to proceed to enforce the security provided by said mortgage and to foreclose the same and collect the principal and interest due upon said bonds.

XI.

And the court doth further find:

1. that thereafter, and on or about the said twenty-ninth day of May 1865, under and by virtue of the laws and con-

solidation statutes of the several states of Ohio, Indiana and Illinois, the said Toledo and Wabash Railway Company, the said The Great Western Railroad Company of 1859, the said Quincy and Toledo Railroad Company, and the said Illinois and Southern Iowa Railroad Company, consolidated together as one corporation under the name of the Toledo, Wabash and Western Railway Company.

XII.

And the court doth further find:

1. that thereafter and on or about the first day of February 1867, the said Toledo, Wabash and Western Railway Company made and executed under its corporate seal, and attested by the signatures of its president and secretary, fourteen thousand two hundred of its bonds bearing date on that day, fourteen thousand thereof, numbered from one to fourteen thousand inclusive, being for one thousand dollars each, and two hundred thereof numbered from fourteen thousand and one to fourteen thousand two hundred, both inclusive, being for five thousand dollars each, payable on the first day of February, 1907, with interest thereon at the rate of seven per centum per annum, payable quarterly on the first days of May, August, November and February of each year on presentation and surrender of the coupons thereto attached, as they should severally become due;

2. that to secure the payment of the principal of the said bonds and of the interest thereon as the same should accrue and become due, the said Toledo, Wabash and Western Railway Company duly made, executed and delivered to the complainant James R. Jesup, and to Isaac H. Knox, as trustees, a mortgage or deed of trust, bearing date on that day, and known as the consolidated mortgage of the said company, and thereby conveyed to the said trustees, upon the trusts therein stated, "all the right of way and railroad of

the said railroad company extending from Toledo, in the State of Ohio to and through the State of Indiana, and thence in the State of Illinois to Meredosia, with branch of said road to Naples, and from said Meredosia to Camp Point in said State of Illinois, and also with branch of said road from Clayton in said state to the east bank of the Mississippi river at Hamilton, in said state as then made, or as thereafter might be made, and as then used, or thereafter might be used, together with all embankments, bridges, turnouts, side tracks, structures, water tanks and fixtures, shops, engine or other houses, depots, turn tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices and all other things, real and personal, then owned or used or that might thereafter be owned or used by the said railroad company in connection with the said railroad, and everything appertaining and appurtenant thereto," and all the franchises, powers, privileges and chartered, or other rights of the said railroad company, together with all the property, real and personal, of said railroad company then acquired, or to be thereafter acquired, at Quincy, in said State of Illinois, as also a certain contract made between the said railroad company and the Chicago, Burlington and Quincy Railroad Company, dated October 26, 1866, with all the rights and privileges secured by the said contracts to said railroad company, and all other contracts ;

3. that the said consolidated mortgage was thereafter duly recorded in all the counties through which the said railroad ran, or in which it was situated, and became and is a lien on all the railway property, equipments and franchises therein mentioned and described, being a first and prior lien upon that portion of said railroad extending from Clayton to Camp Point, and upon that portion of said railroad extending from Carthage to Elvaston, and being a second lien upon that portion of said railroad extending from the west bank of the Illinois river opposite Meredosia to Clayton,

in the state of Illinois, subject to the prior lien of the mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, and upon that portion of the said railroad running from Clayton to Carthage in the said state of Illinois, subject to the prior lien of the mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup as trustees; and being a third lien upon the remaining portions of the said railroad, subject to the prior lien of the mortgage executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden as trustees, and of the mortgage executed by said last named company to Solon Humphreys and James R. Jesup, as trustees, and of the mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company as trustee, and of the mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan as trustee, and of the mortgage executed by the Toledo and Illinois Railroad Company to the said Farmers Loan and Trust Company as trustee, and of the mortgage executed by the Toledo and Wabash Railroad Company to the said Edwin D. Morgan as trustee;

4. That the said consolidated mortgage, among other things, contained provisions for a sinking fund for the payment and extinguishment of all the bonds secured by said mortgage, by the payment to commissioners of fifty thousand dollars per year, in installments of twenty-five thousand dollars every six months until and including the maturity of said bonds;

that the said mortgage and said bonds also contain covenants that in case of default in any of the quarter yearly installments of interest on any of said bonds, or in the said semi-annual payments to the sinking fund, and the continuance of such defaults, or either of them, for the period of

six months, the principal of all the said bonds secured by said consolidated mortgage should forthwith become immediately due at the option of the holder or holders of a majority in interest of the said bonds then outstanding to be expressed by them in writing to the trustees of said mortgage;

5. that the said bonds secured by said consolidated mortgage were thereafter duly issued and delivered to the amount of two millions seven hundred thousand dollars; that of said amount ninety thousand dollars have been retired by means of the said sinking fund, and that there are now outstanding said bonds secured by said consolidated mortgage to the amount of two millions six hundred and ten thousand dollars in the hands of divers persons and corporations holders thereof for value;

6. that the said Isaac H. Knox, one of the said trustees, departed this life on or about the twenty-first day of December 1888, and the complainant Edward H. Dixon has been duly elected in accordance with the terms of said consolidated mortgage to fill the vacancy thereby created;

7. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter set forth of said The Toledo, Wabash and Western Railway Company, failed to pay the interest maturing on said bonds on the first day of August 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due August 1, 1884 and November 1, 1884, were paid by the receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons;

8. that after the default in payment of the interest on the bonds secured by the said consolidated mortgage had con-

tinued for more than the space of six months, the holders of more than a majority of the bonds outstanding and secured by said mortgage, by notice in writing, notified the trustees of said consolidated mortgage that as such holders they elected to consider the principal of said bonds due and payable in consequence of such default, and required the said trustees to proceed with the foreclosure of said consolidated mortgage;

9. that there is now due, owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid instalments of interest to the first day of February 1889, the sum of three millions four hundred and seventy-nine thousand six hundred and fifty two dollars, together with interest on said sum from said first day of February 1889, to the date of this decree, and that such sum is so due, independent of and in addition to the amount hereinafter declared to be due by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds.

XIII.

And the court doth further find:

1. that the Decatur and East St. Louis Railroad Company was a corporation duly incorporated under an act of the legislature of the State of Illinois, on or about the twenty-sixth day of February 1867, with full power and authority to locate, construct, finish and maintain a railroad with one or more tracks commencing at some suitable point at or near the town of Decatur, in Macon county in Illinois, and running from thence to East St. Louis through the towns of Taylorville in Christian county, Litchfield in Montgomery county, Stanton in Macoupin county, and Edwardsville in Madison county, upon the most eligible route and with the usual powers of railway corporations;

2. that the said Decatur and East St. Louis Railroad Company thereafter duly made and executed its twenty-seven hundred bonds, for one thousand dollars each, bearing date the first day of August 1869, payable on the first day of August 1889, with interest at the rate of seven per centum per annum payable semi annually on the first days of February and August of each year, on presentation and surrender of the coupons thereto attached as they should severally become due;

3. that in order to secure the payment of the said bonds and the interest thereon as the same should accrue and become due and payable the said Decatur and East St. Louis Railroad Company duly made, executed and delivered to Isaac H. Knox as trustee a mortgage or deed of trust bearing date the third day of June 1869, and thereby conveyed to the said trustee upon the trusts therein stated the said Decatur and East St. Louis Railroad Company's railroad, track, land, depot grounds, depots, buildings, structures, equipments, rolling stock and property of every description owned, constructed and used, or in future to be owned, constructed and used, on the line of their said road, from Decatur to East St. Louis both inclusive, together with the road bed, tracks, side tracks, branches, lands, gravel pits, stations, shops, cars, engines, tools and machinery of every description and including all rights, credits, franchises and property real and personal and mixed acquired or to be acquired by said railroad company;

4. that the said mortgage was thereafter duly recorded in all the counties in said State of Illinois through which the said railroad ran or in which it was situated, and became and is a first and prior lien upon all the railway property, equipments and franchises therein mentioned and described; and that all of the said bonds secured thereby were duly issued and delivered and are now outstanding in

the hands of divers persons and corporations holders thereof for value;

5. that the said Isaac H. Knox the trustee named in said mortgage having departed this life on or about the twenty-first day of December 1888, as hereinbefore found, the defendant the Central Trust Company of New York has been duly substituted as trustee in his place and stead;

6. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation to said Decatur and East St. Louis Railroad Company, as hereinafter stated, failed to pay the interest maturing on said bonds on the first day of August, 1884, and that default has been made in the payment of the coupons on the said bonds maturing since said date although payment thereof has been duly demanded at the respective dates of maturity thereof; that the coupons maturing August 1, 1884 and February 1, 1885 and August 1, 1885 and February 1, 1886 and August 1, 1886 have since been paid by the receivers, appointed as hereinafter stated, leaving unpaid all subsequent coupons;

7. that there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February, 1889, the sum of three millions two hundred thousand eight hundred and fifty dollars, together with interest on said sum from the said first day of May 1889, and that such sum is independent of and in addition to the amount hereinafter declared to be owing and unpaid by reason of the issue of and apportionment to said mortgage or trust deed of scrip certificates and funded debt bonds;

8. that the holders of more than one-half of the said bonds outstanding and secured by said mortgage, by notice

in writing have required the trustee to seek to obtain possession of the railroad and property covered thereby, and to foreclose said mortgage and sell the said mortgaged premises for the benefit of the holders of said bonds;

XIV.

And the court doth further find:

1. that on or about the third day of June 1869, the said The Toledo, Wabash and Western Railway Company and the said Decatur and East St. Louis Railroad Company consolidated together under the laws of the State of Illinois under the name of The Toledo, Wabash and Western Railway Company;

2. that thereafter by virtue of a decree of foreclosure and sale made in an action pending in the Court of Common Pleas of Lucas county, Ohio, on the twenty-first day of december, 1875, and by virtue of decrees of foreclosure and sale made in actions pending in the Circuit Court of Cass county, Indiana, and in the Circuit Court of Vermillion county, Illinois, at the February Term 1876, of said courts respectively, for the foreclosure of a certain mortgage theretofore executed by the said The Toledo, Wabash and Western Railway Company, and known as the "Gold Bond" mortgage, all and singular the railway of said The Toledo, Wabash and Western Railway Company lying in the States of Ohio, Indiana and Illinois was sold and conveyed to John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post;

3. that thereafter said purchasers caused to be organized under the laws of the state of Ohio a corporation called the Wabash Railway of Ohio, and also caused to be organized under the laws of the state of Indiana a corporation called the Wabash Railway Company of Indiana, and also caused

to be organized under the laws of the State of Illinois, a corporation called the Wabash Railway company of Illinois; that thereafter the said three corporations consolidated under the laws of the said several states of Ohio, Indiana and Illinois, under the name of, The Wabash Railway Company, and that thereafter the said John W. Ellis, Alexander M. White, John T. Martin, George I. Seney and Henry A. V. Post, by deed bearing date the twelfth day of January 1877, duly conveyed to the said The Wabash Railway Company, all their right, title and interest of in and to all and singular the continuous railway extending from its eastern terminus at Toledo in the state of Ohio, through the states of Indiana and Illinois to East St. Louis and also to East Hannibal, Quincy and Hamilton on the Mississippi river in the state of Illinois, and therefore known as the Toledo, Wabash and Western Railroad or Railway.

XV.

And the court doth further find:

1. that thereafter the said Wabash Railway Company became the purchaser of a certain line of railroad theretofore known as the Hannibal and Naples Railroad, extending from Naples in Scott County in the state of Illinois, to the Mississippi river at East Hannibal in said state;

2. that thereafter the said Wabash Railway Company, in payment of the purchase price of the said railroad, duly made and executed its five hundred bonds bearing date the sixteenth day of May 1879, for one thousand dollars each, payable on the first day of June 1909 with interest at the rate of seven per centum per annum, payable semi-annually on the first days of December and June in each year, on presentation and surrender of the coupons thereto attached as they should respectively become due;

3. that in order to secure the payment of the principal of the said bonds, and of the interest thereon as the same should from time to time mature and become due and payable, the said Wabash Railway Company duly made, executed and delivered to Alfred T. White, as trustee, a mortgage or deed of trust bearing date the said sixteenth day of May 1879, and thereby conveyed to the said trustee, upon the trusts therein stated, the Hannibal and Naples Railroad, from Naples in Scott county, Illinois, to the Mississippi river at East Hannibal as then laid out and constructed, with all sidings, appurtenances, and belongings, the same as conveyed by Alexander M. White to said Wabash Railway Company by deed dated , 1878;

4. that the said mortgage was thereafter duly recorded in the various counties in the said State of Illinois through which the said railroad ran or in which it was situated, and became and is a first and prior lien upon the railroad property, equipments and franchises therein mentioned and described;

5. that all the bonds secured by said mortgage were duly issued and are now outstanding in the hands of divers persons, owners and holders thereof for value;

6. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation as hereinafter stated to said Wabash Railway Company failed to pay the interest on said bonds maturing on the first day of June 1884, and that default has been made in the payment of the coupons on said bonds maturing since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupons due June 1, 1884 and December 1, 1884 and June 1, 1885, and December 1, 1885 and June 1, 1886 have since been paid by the receivers, appointed

as hereinafter set forth, leaving unpaid all subsequent coupons;

7. that there is now owing and unpaid for principal and interest upon the said bonds and interest upon the several unpaid installments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of five hundred and ninety-nine thousand four hundred and fifty-eight dollars and thirty-three cents, together with interest on said sum from said first day of February 1889 to the date of this decree;

8. that the holders of more than a majority in value of the outstanding bonds secured by said mortgage, by notice in writing, have required the said trustee to foreclose said mortgage for nonpayment of the interest coupons attached to said bonds.

XVI.

And the court doth further find—

1. that the said Wabash Railway Company thereafter duly made and executed its two thousand bonds for one thousand dollars each, bearing date the seventh day of May 1879, payable on the first day of April 1909, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each year on presentation and surrender of the coupons thereto attached as they should severally become due;

2. that in order to secure the payment of the principal of the said bonds, together with the interest thereon as the same should mature and become due and payable, the said Wabash Railway Company duly made, executed and delivered to Solon Humphreys and Daniel A. Lindley, as trustees, a mortgage or deed of trust, bearing date on the said

seventeenth day of May 1879, and thereby conveyed to the said trustees, upon the trusts therein specified, " all the railroad, road bed and right of way of the said railway company, extending from the city of Toledo, in the state of Ohio, through the state of Indiana, and thence into the state of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the state of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hannibal in said state, and with branch of said road leading from Decatur, in said state, to East St. Louis, in the same state, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixtures, shops, ongine and other houses, depots, turntables, engine machinery, cars, tools, rolling stock, lots, lands, buildings and offices, and other things, real and personal, then owned or used, or that might thereafter be owned or used by the said railroad company in connection with the said railroad, and every appurtenant thereto, and all the powers, privileges, franchises and chartered or other rights of the said Wabash Railway Company, together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining," and all reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all contracts, leases and rights then existing or that might thereafter be acquired by said railroad company with other corporations, companies or individuals, and all the estate, right, title, interest and demand, as well at law as in equity of the said railway company in and to the same, and every part thereof, with the said appurtenances;

3. that the said mortgage or deed of trust was thereafter duly recorded in the various counties through which the said line of railroad ran or in which it was situated, and became and is a lien upon the railway property, equipments and franchises mentioned and described therein, but subse-

quent and subject to the respective liens of the various mortgages theretofore executed by the said railway company and its predecessor corporations, and hereinbefore particularly set forth;

4. that all the bonds secured by the said mortgage or deed of trust were issued and are now outstanding in the hands of divers persons and corporations holders thereof for value;

5. that the Wabash, St. Louis and Pacific Railway Company, the successor corporation to the said Wabash Railway Company, failed to pay the interest maturing on said bonds on the first day of October 1884, and that default has been made in the payment of the coupons maturing on said bonds since said date, although payment thereof has been duly demanded at the respective dates of the maturity thereof; that the coupon maturing October 1, 1884 has since been paid by the receivers appointed as hereinafter set forth, leaving unpaid all subsequent coupons;

6. that there is now due, owing and unpaid for principal and interest on the said bonds and interest on the several unpaid instalments of interest from the dates at which they respectively became due to the first day of February 1889, the sum of two millions six hundred and seventy-six thousand six hundred and sixty-six dollars and sixty-six cents, together with interest on said sum from the said first day of February 1889, to the date of this decree.

XVI (a).

Reference is hereby made to the report of the masters filed herein for a detailed statement of the amounts outstanding and unpaid for interest and for principal on each of said mortgages respectively.

XVII.

And the court doth further find:

1. that the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company, as trustee, is the first and best lien upon all the line of railway, premises and property therein mentioned and described;

2. that the said mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company, as trustee, is the first and best lien upon all the line of railway, premises and property therein mentioned and described;

3. that the mortgage executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan as trustee is a lien upon all the line of railway, premises and property therein mentioned and described subject to the prior lien of the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company;

4. that the mortgage executed by the Wabash and Western Railway Company is a lien upon the line of railway, premises and property therein mentioned and described subject to the prior lien of the said mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company;

5. That the mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup, as trustees, is the first and best lien upon all the line of railway, premises and property therein mentioned and described;

6. that the mortgage executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander

M. White and Henry H. Warden, as trustees, is the first and best lien upon the line of railway, premises and property therein mentioned and described, subject only to the lien of a mortgage executed by the Great Western Railroad Company to the Farmers Loan and Trust Company, as trustee, to the extent of four thousand dollars and interest;

7. that the mortgage executed by the said Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jesup, as trustees, is a lien upon the line of railway, premises and property therein mentioned and described, subject to the prior lien of the mortgage executed by said company to said Griswold, White and Warden, and to the lien of said mortgage executed by the Great Western Railroad Company to the Farmers Loan and Trust Company to the extent of said four thousand dollars and interest;

8. that the mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described;

9. that the mortgage executed by the Toledo, Wabash and Western Railway Company to James R. Jesup and Isaac H. Knox, as trustees, is the first and best lien upon that portion of the said railways extending from Carthage to Elvaston, and upon that portion of the said railways extending from Clayton to Camp Point, and is a second lien upon that portion of said railway extending from the west bank of the Illinois river opposite Meredosia to Clayton in the state of Illinois, subject to the prior lien of the said mortgage executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, and upon that portion of the said railway extending from Clayton to Carthage in the state of Illinois, subject to the lien of the said mortgage executed by the Illinois and Southern Iowa Railroad Company to Lucien Tilton, John

N. A. Griswold and James R. Jesup, as trustees, and is a third lien upon that portion of the said railway extending from Naples and Meredosia to the boundary line between the states of Illinois and Indiana, subject to the prior liens thereon of the said mortgages executed by the Great Western Railway Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden, as trustees, and to Solon Humphreys and James R. Jesup, as trustees, and to the lien of said mortgage executed by the Great Western Railroad Company to the Farmers Loan and Trust Company to the extent of four thousand dollars and interest, and on that portion of said railway extending across the state of Indiana subject to the prior lien of the mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company, as trustee, and of the mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, and upon that portion of said railway extending from the state line between Indiana and Ohio to Toledo, subject to the prior lien of the mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company, as trustee, and of the mortgage executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee;

10. that the mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described.

11. that the mortgage executed by the Wabash Railway Company to Alfred T. White, as trustee, is the first and best lien upon the line of railway, premises and property therein mentioned and described;

12. that the mortgage executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as

trustees, is a lien upon the lines of railway, premises and property therein mentioned and described subject to the prior liens of all the several mortgages hereinbefore in this finding set forth.

XVIII.

And the court doth further find:

that the parcels of real estate embraced in terminal properties and attached to the various divisions of the said railway are to be regarded as accessions to said divisions respectively and are subject to the lien of the divisional and the respective general mortgages in the order of their respective priorities.

XIX.

And the Court doth further find:

that prior to the consolidation in 1879 the several predecessor companies of the Wabash Railway Company had owned and used upon their several lines of railway respectively certain amounts of rolling stock and equipment, which were subject to the liens of the various divisional mortgages hereinbefore set forth, and to the lien of the consolidated mortgage and the mortgage of 1879;

that since said time the Wabash, St. Louis and Pacific Railway Company have purchased and acquired for service thereon large additional amounts of equipment, and that the several receivers Humphreys and Tutt and Cooley and McNulta have also made additions thereto, and that such various additions have in accordance with the terms of said divisional mortgages become subject to the liens thereof; and also to the lien of the consolidated mortgage and the mortgage of 1879;

that the said rolling stock and equipment has been used indiscriminately upon the entire system of railway without

any apportionment thereof to any particular division of road, and has been so used, commingled and renewed that the lien of the said several mortgages cannot be declared therein except as a whole.

The court, however, for the purposes of this decree and of the sale hereunder hereinafter provided for, and not otherwise, hereby finds that the division from Toledo to the Indiana state line shall be entitled to seventy-five nine-hundredths thereof; the division from the state line of Ohio west to the state line of Illinois, to one hundred and sixty-six nine-hundredths thereof; the division from the state line between Indiana and Illinois to Naples and Meredosia to one hundred and eighty nine-hundredths thereof; the division from Clayton to the west side of the Illinois river opposite Meredosia to thirty-four nine-hundredths thereof; the division from Clayton to Carthage to twenty-nine nine-hundredths thereof; the division from Naples to the Mississippi river, opposite East Hamilton, to fifty nine-hundredths thereof; the division from Decatur to East St. Louis to one hundred and eight nine-hundredths thereof; the line from Clayton to Camp Point to six nine-hundredths thereof; the line from Carthage to Elvaston to six nine-hundredths thereof; and the line of road known as the Chicago division (which is not otherwise included in this decree), to two hundred and forty-six nine-hundredths thereof.

XX.

And the court doth further find:

1. that thereafter and on or about the fourteenth day of August 1879, the said The Wabash Railway Company consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of the state of Missouri and owning and operating a line of railway extending from St. Louis, Missouri to Kansas City, in said state with various

branches, the consolidated corporation being known as The Wabash, St. Louis and Pacific Railway Company;

2. that thereafter and on or about the first day of June 1880, the said The Wabash, St. Louis and Pacific Railway Company in order to secure a proposed issue of its bonds aggregating fifty millions of dollars, payable on the first day of June 1920, with interest at six per cent. per annum, payable semi-annually, made and executed to the defendants The Central Trust Company of New York and James Cheney, a mortgage or deed of trust bearing date on said day, and thereby conveyed to said trustees, upon the trusts therein stated and subject to the prior liens thereon, all and singular the lines of railway of said mortgagor wherever situate, together with the equipment, appurtenances and franchises thereunto belonging;

3. that thereafter the bonds secured by said mortgage or deed of trust were issued and delivered to the amount of about seventeen millions of dollars;

4. that thereafter and on or about the twenty-eighth day of May 1884 the said Wabash, St. Louis and Pacific Railway Company filed in the Circuit Court of the United States for the Eastern District of Missouri its bill in equity against the said The Central Trust Company of New York, James Cheney and others and, alleging its insolvency, prayed for the appointment of receivers of its property;

5. that by an order of said court entered on said day Solon Humphreys and Thomas E. Tutt were appointed receivers with power to take possession of all the lands, railroad and property, rights and choses in action of said Wabash, St. Louis and Pacific Railway Company within the jurisdiction of the court;

6. that in an action of similar character instituted in this court by said Wabash, St. Louis and Pacific Railway Company against said defendants a similar order was made by this Court, the said order of the said Circuit Court of the United States for the Eastern District of Missouri being made the order of this court;

7. that the said Solon Humphreys and Thomas E. Tutt entered upon and took possession of the property of the said Wabash, St. Louis and Pacific Railway Company and used and operated the same;

8. that thereafter The Central Trust Company of New York and James Cheney instituted actions in the courts of the various states in which any part of the railway property of the said Wabash, St. Louis and Pacific Railway Company was situated, against said company and others for a foreclosure of said general mortgage executed to them by said railway company; that each of said actions was removed from the state court in which the same was pending to the Circuit Court of the United States for the corresponding district, and that with the action so removed to the Circuit Court of the United States for the Eastern District of Missouri, was consolidated said action instituted in said court by said Wabash, St. Louis and Pacific Railway Company;

9. that on or about the sixth day of January 1886, a decree was entered in the said consolidated action foreclosing the said general mortgage of the Wabash, St. Louis and Pacific Railway Company, and ordering the railways and property in said decree described to be sold, subject to the liens of the mortgages executed prior to the said general mortgage by said Wabash, St. Louis and Pacific Railway Company, or any of its predecessor corporations;

10. that thereafter, and on or about the twenty-sixth day of April 1886, under and in pursuance of said decree the

property therein directed to be sold was so sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, acting as a purchasing committee; that by decree of the Circuit Court of the United States for the Eastern District of Missouri, entered on or about the fifteenth day of June 1886, the said sale was ratified and confirmed, and that the master by whom the said property was sold has executed a deed of said railways and property to said purchasers, including the railways and property mentioned and described in the mortgages hereinbefore in this decree recited, subject in all things to the lien of said mortgages;

11. that by an order of the Circuit Court of the United States for the Southern District of Illinois, bearing date and entered on or about the sixteenth day of December 1886, Solon Humphreys and Thomas E. Tutt were removed as receivers of the said Wabash, St. Louis and Pacific Railway Company, within the jurisdiction of said court, and Thomas M. Cooley was appointed receiver in their place and stead of said property, being appointed receiver of all the property described and set forth in the amended and supplemental complaint in this action;

12. that thereafter and on or about the first day of April 1887, the said Thomas M. Cooley resigned as such receiver, and by order of said Court bearing date and entered on said day, John McNulta was duly appointed successor to said Cooley as such receiver.

XXI.

And the court doth further find:

1. that at the time of the filing in this court of the original and amended and supplemental bills in this cause, and

of the various cross-bills herein, the said mortgaged railways, property and premises were in the possession of this court through its receiver appointed by its order.

XXII.

And the court doth further find :

1. that on or about January 24th. 1877, the said Wabash Railway Company, in order to provide for the payment of interest theretofore accrued and then still due and unpaid and shortly thereafter to become due, upon the several issues of bonds hereinafter stated, proposed to the holders of the coupons representing such interest, to fund the same under an agreement by which the said holders should deposit the same in trust and receive in lieu thereof scrip certificates, exchangeable at the option of the holders for bonds of the said Wabash Company, to be known as funded debt bonds ;

2. that the said proposition was thereafter accepted by holders of the said coupons, who thereafter deposited the same in trust with the defendant, the Metropolitan National Bank, receiving in lieu thereof a scrip certificate, reciting the deposit, the number and amount of the coupons, the numbers of the bonds to which they belonged, and entitling the holder thereof to interest thereon, at the rate of seven per cent. per annum, payable yearly, and also entitling such holders to exchange such certificates at their option for bonds of the Wabash Railway Company, to be known as funded debt bonds ;

that thereafter certain of the holders of said scrip certificates exchanged the same for said funded debt bonds, payable on the first day of February 1907, with interest at the rate of seven per centum per annum, payable semi-annually ;

3. that the said scrip certificates and the said funded debt bonds provided that in case of default in payment of the interest thereon, the holders thereof should be entitled to demand and receive possession of the original coupons deposited therefor, and that the agreement between the said Wabash Railway Company and the holders of said coupons also provided that the deposit of said coupons and the acceptance of said funded debt bonds should in no way impair the lien on the respective portions of the roads by which the respective bonds and coupons were secured;

4. that the said funded debt bonds were apportioned by numbers to the several mortgage liens upon the several portions of the road primarily liable for the coupons in default, in proportion to the aggregate amount of such defaulted coupons;

5. that thereafter an agreement was entered into between the said Wabash Railway Company and certain holders of coupons belonging to bonds of the Toledo and Wabash Railroad Company, the Wabash and Western Railway Company, the Great Western Railroad Company of 1859, the Toledo, Wabash and Western Railway Company, and the Decatur and East St. Louis Railroad Company, whereby said coupon holders received in exchange for such coupons when deposited, a scrip certificate bearing interest graduated up to six per centum per annum, and received for said scrip certificates at their option funded debt bonds bearing interest at six per centum per annum;

6. that prior thereto, certain holders of overdue coupons had exchanged the same for scrip certificates and funded debt bonds bearing interest at the rate of seven per centum per annum, and that such holders having refused to exchange the same for said graduated scrip and funded debt bonds, said seven per cent. scrip and funded debt bonds are still outstanding and unpaid;

7. that the total amount of coupons deposited with the said Metropolitan National Bank was three millions and nine thousand eight hundred and fifty dollars and thirty-seven cents;

8. that the said coupons represented interest on said bonds falling due in 1875, 1876 and 1877, as follows, viz.: on the bonds of the Toledo and Illinois Railroad Company four coupons amounting to one hundred and forty dollars, together with accrued interest thereon amounting to twelve dollars and twenty-five cents, making in all one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Lake Erie, Wabash and St. Louis Railroad Company, four coupons, amounting to one hundred and forty dollars, together with the sum of twelve dollars and twenty-five cents, accrued interest thereon, making in all one hundred and fifty-two dollars and twenty-five cents; on the first mortgage bonds of the Great Western Railroad Company of 1859 four coupons amounting to one hundred and forty dollars, together with the sum of twelve dollars and twenty-five cents accrued interest thereon, making in all the sum of one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Illinois and Southern Iowa Railroad Company four coupons amounting to one hundred and forty dollars, together with twelve dollars and twenty-five cents accrued interest thereon, making in all the sum of one hundred and fifty-two dollars and twenty-five cents; on the bonds of the Quincy and Toledo Railroad Company five coupons amounting to one hundred and seventy-five dollars; on the bonds of the Decatur and East St. Louis Railroad Company five coupons amounting to one hundred and seventy-five dollars; on the bonds of the Toledo and Wabash Railroad Company five coupons amounting to one hundred and seventy-five dollars; on the bonds of the Wabash and Western Railway Company five coupons amounting to one hundred and seventy-five dollars; on the second mortgage

bonds of the Great Western Railroad Company of 1859, five coupons amounting to one hundred and seventy-five dollars, and on the consolidated mortgage of the Toledo, Wabash and Western Railway Company fourteen coupons amounting to the sum of two hundred and forty-five dollars;

9. that default was made in the payment of interest upon the outstanding scrip certificates on the first day of February 1887, and on the first day of February 1888, and in the payment of the coupons upon the funded debt bonds due on the first day of February 1887, and on the first day of August 1887, and on the first day of February 1888, and on the first day of August 1888;

10. that there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Toledo and Illinois Railroad Company, together with interest on the defaulted interest payments at the rate of six per centum per annum to the first day of February 1889, the sum of seventy-six thousand seven hundred and twenty dollars and twenty-nine cents, together with interest on said last named sum from said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid for principal and interest on the funded debt bonds based upon coupons from bonds of the Toledo and Illinois Railroad Company together with interest on the overdue coupons from the respective dates of maturity thereof to the first day of February 1889, the sum of eighty-five thousand three hundred and fifty-six dollars, together with interest on said last-mentioned sum from the said first day of February 1889, to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the

property mentioned and described in the said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

11. that there is now owing and unpaid for principal and interest on the scrip certificates based upon coupons from bonds of the Lake Erie, Wabash and St. Louis Railroad Company, and interest at six per centum per annum on the defaulted payments of interest from the dates of such respective defaults to the first day of February, 1889, the sum of two hundred and thirteen thousand four hundred and forty-one dollars and thirty-seven cents, together with interest on said last-mentioned sum from the said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid on the funded debt bonds based upon coupons from bonds of the said Lake Erie, Wabash and St. Louis Railroad Company, for principal and interest, and interest at six per centum per annum upon the overdue coupons from the respective dates of the maturity thereof the sum of two hundred and thirty-seven thousand one hundred dollars, together with interest on said last-mentioned sum from the said first day of February 1889 to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company as trustee added to the amount found to be secured by said mortgage, according to the tenor thereof, and payable out of the proceeds of any sale of said property *pro rata* therewith;

12. that there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Illinois and Southern Iowa Railroad Company, and interest at six per centum per annum, on the defaulted interest payments from the dates of the said defaults respectively to the first day of February 1889, the sum of one thousand two hundred and sixty-one dollars and twenty-one cents, together with interest on said sum from the said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the said Illinois and Southern Iowa Railroad Company, and interest upon the defaulted coupons from the respective dates of maturity thereof to the first day of February 1889, at the rate of six per centum per annum, the sum of forty-nine thousand seven hundred and ninety-one dollars, together with interest on said sum from the first day of February 1889, to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the mortgage executed by the said Illinois and Southern Iowa Railroad Company to Lucien Tilton, James R. Jesup and John N. A. Griswold as trustees added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of the said property pro rata therewith;

13. that there is now due, owing and unpaid for principal and interest upon the scrip certificates based upon coupons from first mortgage bonds of the Great Western Railroad Company of 1859, and interest at six per centum per annum on the defaulted interest payments from the dates of the respective defaults to the first day of February

1889, the sum of one hundred and thirty-five thousand five hundred and sixty-five dollars and forty-five cents, together with interest on said sum from the said first day of February 1889, to the date of this decree;

that there is also now due, owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from said first mortgage bonds of the Great Western Railroad of 1859, and interest upon the defaulted coupons at the rate of seven per centum per annum from the dates of the maturity thereof respectively to the first day of February 1889, the sum of three hundred and fourteen thousand seven hundred and fifty dollars and twenty-five cents, together with interest on said sum at seven per centum per annum from the said first day of February 1889, to the date of this decree;

that the amounts so found to be due on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Great Western Railroad Company of 1859, to George Griswold, Alexander M. White and Henry H. Warden, as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

14. that there is now owing and unpaid for principal and interest upon scrip certificates based upon coupons from bonds of the Quincy and Toledo Railroad Company and interest at six per centum per annum on the defaulted interest payments from the dates of the respective defaults to the first day of February 1889, the sum of nineteen thousand two hundred and eighty-nine dollars and forty-two cents, together with interest on said sum from said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the remaining outstanding scrip certificates based upon coupons from bonds of said Quincy and Toledo Railroad Company and interest at six per centum per annum upon the defaulted interest payments from the dates of such defaults respectively to the first day of February 1889, the sum of thirty-four thousand nine hundred and fifty-one dollars and twenty-two cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that there is also now owing and unpaid upon the funded debt bonds based upon coupons from said bonds of the Quincy and Toledo Railroad Company and interest at six per centum per annum on the overdue coupons from the dates of the respective maturities thereof to the first day of February 1889, the sum of forty-seven thousand five hundred and nineteen dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that the amounts so found to be owing and on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Quincy and Toledo Railroad Company to John T. Terry, as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

15. that there is now owing and unpaid for principal and interest upon scrip certificates based upon coupons from bonds of the Decatur and East St. Louis Railroad Company, and interest at six per centum per annum upon the defaulted interest payments from the dates of the respective defaults to the first day of February 1889, the sum of fifty-

two thousand eight hundred and nine dollars and twenty-three cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the remaining outstanding scrip certificates, based upon coupons from bonds of the said Decatur and East St. Louis Railroad Company, and interest at six per centum per annum upon the defaulted interest payments from the date of such defaults respectively to the first day of February 1889, the sum of one hundred and forty-nine thousand four hundred and thirty-nine dollars and sixty cents, together with interest on said sum at six per centum per annum from the said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the Decatur and East St. Louis Railroad Company, and interest on the defaulted coupons belonging to said funded debt bonds from the dates of the maturity thereof, respectively, to the first day of February 1889, at the rate of six per centum per annum, the sum of three hundred and forty thousand one hundred and sixty-six dollars and fifty cents, together with interest on said sum from the said first day of February 1889, to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

16. that there is now owing and unpaid for principal and interest upon the scrip certificates, based upon coupons from bonds of the Toledo and Wabash Railroad Company, and interest at the rate of six per centum per annum upon the defaulted interest payments from the dates of such defaults respectively, to the first day of February 1889, the sum of ninety thousand one hundred and fifteen dollars and fifty-three cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the said Toledo and Wabash Railroad Company, and interest on the defaulted coupons belonging to said funded debt bonds from the dates of the maturity thereof respectively to the first day of February 1889, at six per centum per annum, the sum of one hundred and thirty-six thousand seven hundred and fifty-two dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and said funded debt bonds are a lien on the property mentioned and described in the mortgage executed by the said Toledo and Wabash Railroad Company to Edwin D. Morgan as trustee, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of the said property *pro rata* therewith;

17. that there is now owing and unpaid for principal and interest upon the scrip certificates based upon coupons from bonds of the Wabash and Western Railway Company, and interest upon the defaulted interest payments at six per centum per annum from the dates of the respective defaults to the first day of February 1889 the sum of one hundred

and twenty-five thousand eight hundred and seventy-eight dollars and ten cents, together with interest on said sum from the said first day of February 1889 to the date of this decree:

that there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from bonds of the said Wabash and Western Railway Company, and interest upon the overdue coupons belonging to said funded debt bonds from the dates of maturity thereof respectively to the first day of February 1889, at the rate of six per centum per annum the sum of two hundred and fourteen thousand two hundred and forty-four dollars and eighty cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip and on said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Wabash and Western Railway Company to Edwin D. Morgan as trustee added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

18. that there is now owing and unpaid for principal and interest upon a portion of the outstanding scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railroad Company of 1859, and interest at six per centum per annum on the defaulted interest payments thereon from the dates of such defaults respectively to the first day of February, 1889, the sum of forty-one thousand seven hundred and twenty-five dollars and sixty-eight cents, together with interest on said sum from the said first day of February 1889, to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the remaining outstanding portion of the scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railway Company of 1859, and interest at six per centum per annum upon the defaulted interest payments thereon from the dates of such defaults respectively to the first day of February 1889, the sum of one hundred and fifty-four thousand seven hundred and ninety-two dollars and fifty-one cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that there is also now owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from the said second mortgage bonds of the Great Western Railway Company of 1859, and interest upon the overdue coupons belonging to said funded debt bonds from the dates of maturity thereof respectively, to the first day of February 1889, at the rate of six per centum per annum, the sum of three hundred and seventy-three thousand one hundred and thirty-seven dollars and sixty cents, together with interest on said sum from the said first day of February 1889, to the date of this decree;

that the amounts so found to be owing and unpaid on said scrip certificates, and said funded debt bonds are a lien on the property mentioned and described in the said mortgage executed by the said Great Western Railway Company of 1859 to Solon Humphreys and James R. Jesup as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith;

19. that there is now due, owing and unpaid for principal and interest upon a portion of the scrip certificates based upon coupons from the consolidated mortgage bonds of the

Toledo, Wabash and Western Railway Company, and interest upon the defaulted interest payments at the rate of six per centum per annum, from the dates of such defaults respectively to the first day of February 1889, the sum of thirty-one thousand seven hundred and nineteen dollars and seven cents, together with interest upon said sum from the said first day of February 1889, to the date of this decree;

that there is also now due, owing and unpaid for principal and interest upon the remaining portion of the outstanding scrip certificates, based upon coupons from the consolidated mortgage bonds of the said Toledo, Wabash and Western Railway Company, and interest upon the defaulted interest payments from the dates of such defaults respectively to the said first day of February 1889, at the rate of six per centum per annum, the sum of one hundred and thirty-one thousand three hundred and thirty-five dollars and seventy-two cents, together with interest on said sum from the said first day of February 1889 to the date of this decree;

that there is also now due, owing and unpaid for principal and interest upon the funded debt bonds based upon coupons from the said consolidated mortgage bonds of the Toledo, Wabash and Western Railway Company, and interest on the overdue coupons belonging to said funded debt bonds from the respective dates of maturity thereof to the first day of February 1889, at six per centum per annum, the sum of six hundred and sixty-eight thousand seven hundred and eighty-two dollars and forty cents, together with interest on said sum from the said first day of February 1889, to the date of this decree, that the amounts so found to be due on said scrip certificates and said funded debt bonds are a lien on the property mentioned and described in the said consolidated mortgage executed by the Toledo, Wabash and

Western Railway Company to Isaac H. Knox and James R. Jesup as trustees, added to the amount found to be secured by said mortgage according to the tenor thereof, and are payable out of the proceeds of any sale of said property *pro rata* therewith.

XXIII.

And the Court doth further find:

that the said funded debt bonds and scrip certificates so issued and apportioned to the several mortgage liens as aforesaid, constitute an enlargement of the principal of the several respective mortgage liens to the amount in each case of the said funded debt bonds and scrip certificates so apportioned, and that the amounts of such funded debt bonds and scrip certificates are in each case an integral part of the mortgage lien to which they were so apportioned, and secured by such mortgage, the principal thereof equally *pro rata* with the principal of said bonds and the interest equally *pro rata* with the interest of said bonds, and are entitled to be paid out of the proceeds of the sale of the property constituting the security of such mortgages respectively.

XXIV.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of one hundred and ninety-two thousand, one hundred and ninety-five dollars and ninety cents, together with interest on said sum from the first day of Feb-

$192,195.90

ruary 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company as trustee, the sum of $166,950. one hundred and sixty-six thousand nine hundred and fifty dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree at the rate of six per centum per annum;

2. for the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Toledo and Illinois Railroad Company, as hereinbefore mentioned, the sum of eleven thousand eight hundred and $11,889.90 eighty-nine dollars and ninety cents, together with interest thereon from the first day of February 1889 to the date of this decree at the rate of six per centum per annum;

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of of the said Toledo and Illinois Railroad Company, the sum thirteen thousand three hundred and fifty- $13,356. six dollars, together with interest thereon at six per centum per annum from the first day of February 1889 to the date of this decree;

4. that within said time they also pay or cause to be paid into court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said Toledo and Illinois Railroad Company's mortgage.

that in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by the Toledo and Illinois Railroad Company to the Farmers Loan and Trust Company, as trustee, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described, be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders by the special masters hereinafter appointed.

XXV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of five hundred and thirty-three thousand nine hundred and twenty-eight dollars and fifty-four cents, together with interest on said sum from the first day of February 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

$533,928.54

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company, as trustee, the sum of four hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum at the rate of six per

$463,750.

centum per annum from the said first day of February 1889 to the date of this decree;

2. for the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Lake Erie, Wabash and St. Louis Railroad Company, as hereinbefore mentioned, the sum of thirty-three thousand and seventy-eight dollars and fifty-four cents, together with interest on said sum at the rate of six per centum per annum from the first day of February 1889, to the date of this decree;

$33,078.54

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from said bonds of the Lake Erie, Wabash and St. Louis Railroad Company, the sum of thirty-seven thousand one hundred dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$37,100.

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage executed by said Lake Erie, Wabash and St. Louis Railroad Company.

that in default of such payment, or any part thereof, the equity of redemption of the defendants, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the said mortgage executed by the said Lake Erie, Wabash and St. Louis Railroad Company to the Farmers Loan and Trust Company as trustee be forever

barred and foreclosed, and that all and singular the railroad, property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction, with redemption, to the highest bidder or bidders by the special masters hereinafter appointed.

XXVI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the sums adjudged to be due upon the securities hereinbefore described, secured by the said mortgage of the Toledo and Illinois Railroad Company pay or cause to be paid into this court the sum of three hundred and eighty-two thousand nine hundred and fifteen dollars and three cents, together with interest on said sum from the first day of February 1889, to the date of this decree at the rate of six per centum per annum; that is to say:

$382,915.03

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Toledo and Wabash Railroad Company, to Edwin D. Morgan, as trustee, the sum of three hundred and thirty-one thousand one hundred dollars, together with interest on said sum at the rate of six per centum per annum, from the said first day of February 1889 to the date of this decree;

$331,100

2. for the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Toledo and Wabash Railroad Company, as hereinbefere mentioned, the sum of twenty thousand and sixty-three dollars and three cents, together

$20,063.03

with interest on said sum at the rate of six per centum per annum, from the first day of February 1889 to the date of this decree;

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from the bonds of the said Toledo and Wabash Railroad Company, the sum of thirty-one thousand seven hundred and fifty-two dollars, together with interest on said sum at the rate of six per centum per annum, from the said first day of February 1889 to the date of this decree;

$31,752

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage of said Toledo and Wabash Railroad Company;

that in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in said mortgage executed by the Toledo, and Wabash Railroad Company to Edwin D. Morgan as trustee, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage, and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXVII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the sums adjudged to be due upon the securities hereinbefore described secured by the said mortgage of the Lake Erie, Wabash and St. Louis Railroad Company, pay or cause to be paid into this court the sum of five hundred and seventy-five thousand four hundred and nineteen dollars and ninety cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

$574,419.00

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Wabash and Western Railway Company to Edwin D. Morgan as trustee the sum of four hundred and ninety-six thousand six hundred and fifty dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$496,650.

2. for the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the said Wabash and Western Railway Company, the sum of twenty-eight thousand and twenty-five dollars and ten cents, together with interest on said sum at the rate of six per centum per annum from the first day of February 1889 to the date of this decree;

$28,025.10

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from the bonds

of the said Wabash and Western Railway
$49,744.50 Company the sum of forty-nine thousand seven hundred and forty-four dollars and fifty cents, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889, to the date of this decree;

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage of said Wabash and Western Railway Company.

that in default of such payment, or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by the Wabash and Western Railway Company to Edwin D. Morgan as trustee, be forever barred and foreclosed and that all and singular the railroad, property equipment and franchises in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders by the special masters hereinafter appointed.

XXVIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid
$55,686.46 into this court the sum of fifty-five thousand six hundred and eighty-six dollars and forty-

six cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Illinois and Southern Iowa Railroad Company to Lucien Tilton, John N. A. Griswold and James R. Jesup, as trustees, the sum of forty-seven thousand seven hundred dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$47,700.

2. for the use and benefit of the holders of the scrip certificates based upon coupons from bonds of the Illinois and Southern Iowa Railroad Company the sum of one hundred and ninety-five dollars and forty-six cents, together with interest on said sum at the rate of six per centum per annum from the first day of February 1889 to the date of this decree;

$195.46

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Illinois and Southern Iowa Railroad Company the sum of seven thousand seven hundred and ninety-one dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$7,791.

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage executed by said Illinois and Southern Iowa Railroad Company;

that in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause excepting the defendant John N. A. Griswold, of, in and to the property mentioned and described in the said mortgage executed by said Illinois and Southern Iowa Railroad Company to said Tilton, Griswold and Jesup as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders by the special masters hereinafter appointed.

XXIX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree, the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court

$3,417,341.32

the sum of three million four hundred and seventeen thousand three hundred and forty-one dollars and thirty-two cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. for the use and benefit of the holders of the first mortgage bond and coupons of the Great Western Railroad Company, secured by mortgage to the Farmers Loan and Trust Company, the sum of three thousand two

$3,275.62

hundred and seventy-five dollars and sixty-two cents, together with interest thereon at

six per centum per annum from the first day of February 1889 to the date of this decree;

2. for the use and benefit of the holders of the bonds and coupons, secured by the mortgage executed by the said Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden, as trustees, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree, at the rate of six per centum per annum.

$2,963,750.

3. for the use and benefit of the holders of the scrip certificates based upon coupons from the first mortgage bonds of the Great Western Railroad Company of 1859, the sum of one hundred and thirty-five thousand five hundred and sixty-five dollars and forty-five cents, together with interest thereon from the said first day of February 1889 to the date of this decree, at the rate of six per centum per annum.

$135,565.45

4. for the use and benefit of the holders of the funded debt bonds and coupons, based upon coupons from the said first mortgage bonds of the Great Western Railroad Company of 1859, the sum of three hundred and fourteen thousand seven hundred and fifty dollars and twenty-five cents, together with interest on said sum, at the rate of six per centum per annum, from the said first day of February 1889 to the date of this decree.

$314,750.25

5. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

that in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause excepting the defendant John N. A. Griswold, of, in and to the property mentioned and described in the said mortgage executed by said Illinois and Southern Iowa Railroad Company to said Tilton, Griswold and Jesup as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders by the special masters hereinafter appointed.

XXIX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree, the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court

$3,417,341.32

the sum of three million four hundred and seventeen thousand three hundred and forty-one dollars and thirty-two cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

1. for the use and benefit of the holders of the first mortgage bond and coupons of the Great Western Railroad Company, secured by mortgage to the Farmers Loan and Trust Company, the sum of three thousand two

$3,275.62

hundred and seventy-five dollars and sixty-two cents, together with interest thereon at

six per centum per annum from the first day of February 1889 to the date of this decree;

2. for the use and benefit of the holders of the bonds and coupons, secured by the mortgage executed by the said Great Western Railroad Company of 1859 to George Griswold, Alexander M. White and Henry H. Warden, as trustees, the sum of two millions nine hundred and sixty-three thousand seven hundred and fifty dollars, together with interest on said sum from the said first day of February 1889 to the date of this decree, at the rate of six per centum per annum.

$2,963,750.

3. for the use and benefit of the holders of the scrip certificates based upon coupons from the first mortgage bonds of the Great Western Railroad Company of 1859, the sum of one hundred and thirty-five thousand five hundred and sixty-five dollars and forty-five cents, together with interest thereon from the said first day of February 1889 to the date of this decree, at the rate of six per centum per annum.

$135,565.45

4. for the use and benefit of the holders of the funded debt bonds and coupons, based upon coupons from the said first mortgage bonds of the Great Western Railroad Company of 1859, the sum of three hundred and fourteen thousand seven hundred and fifty dollars and twenty-five cents, together with interest on said sum, at the rate of six per centum per annum, from the said first day of February 1889 to the date of this decree.

$314,750.25

5. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

that in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in said mortgage executed by said Great Western Railroad Company of 1859 to said Griswold, White and Warden, as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly mentioned and described, be sold as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ten days after the entry of this decree, the mortgagor corporation or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the amounts heretofore adjudged to be due on the first mortgage of the Great Western Railroad Company pay or cause to be paid into this court the sum of nine hundred and fifty-nine thousand six hundred and thirty-five dollars and seventy-nine cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

$959,635.79

1. for the use and benefit of the holders of the bonds and coupons secured by the second mortgage of the Great Western Railroad Company of 1859, executed to Solon Humphreys and James R. Jesup as trustees, the sum of eight hundred and twenty-seven thousand seven hundred and fifty dollars,

$827,750.

together with interest on said sum from the first day of February 1889 to the date of this decree;

2. for the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from the second mortgage bonds of the Great Western Railroad Company of 1859 the sum of thirty-four thousand four hundred and sixty-two dollars and fifty-one cents, and for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of ten thousand seven hundred and eighty-five dollars and sixty-eight cents, together with interest on both said sums at the rate of six per centum per annum from the first day of February 1889 to the date of this decree;

$34,462.51

$10,785.68

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from said second mortgage bonds of the Great Western Railroad Company of 1859 the sum of eighty-six thousand six hundred and thirty-seven dollars and sixty cents, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$86,637.60

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage;

that in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defend-

ants in this cause of, in and to the property mentioned and described in the mortgage executed by the said Great Western Railroad Company of 1859 to Solon Humphreys and James R. Jesup as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders, by the special masters hereinafter appointed.

XXXI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of ninety-seven thousand two hundred and nine dollars and sixty-four cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say:

$97,209.64

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Quincy and Toledo Railroad Company to John T. Terry as trustee, the sum of eighty-two thousand nine hundred and fifty dollars, together with interest on said sum at six per centum per annum from the said first day of February 1889 to the date of this decree;

$82,950.

2. for the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from the bonds of the Quincy and Toledo Railroad Company, the sum of four thousand seven hundred and fifty-one dollars and twenty-two cents, and for the

$4,751.22.

use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of two thousand nine hundred and eighty-nine dollars and forty-two cents, together with interest on both said sums from the first day of February 1889 to the date of this decree.

$2,989.42

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Quincy and Toledo Railroad Company the sum of six thousand five hundred and nineteen dollars, together with interest on said sum from the first day of February 1889 to the date of this decree at the rate of six per centum per annum;

$6,519.

4. that within this said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage;

that in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the mortgage executed by the said Quincy and Toledo Railroad Company to John T. Terry as trustee be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described, be sold, as hereinafter directed, at public auction without redemption to the highest bidder or bidders, by the special masters hereinafter appointed.

XXXII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the various amounts hereinbefore adjudged to be due upon the divisional first and second mortgage bonds, pay or cause to be paid into this court the sum of four million three hundred and eleven thousand four hundred and eighty-nine dollars and nineteen cents, together with interest on said sums from the first day of February 1889 to the date of this decree, at the rate of six per centum per annum; that is to say:

$4,311,489.19

1. for the use and benefit of the holders of the bonds and coupons secured by the consolidated mortgage executed by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jesup, as trustees, the sum of three millions four hundred and seventy-nine thousand six hundred and fifty-two dollars, together with interest on said sum at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

$3,479,652.

2. for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from bonds of the Toledo, Wabash and Western Railway Company the sum of thirty-one thousand seven hundred and nineteen dollars and seven cents, and for the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from said bonds the sum of one hundred and thirty-one thousand three hundred and thirty-five dollars and seventy-two cents, to-

$31,719.07

$131,335.72

gether with interest on both said sums at six per centum per annum from the first day of February 1889 to the date of this decree;

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from bonds of the said Toledo, Wabash and Western Railway Company the sum of six hundred and sixty-eight thousand seven hundred and eighty-two dollars and forty cents, together with interest at the rate of six per centum per annum from the said first day of February 1889 to the date of this decree;

4. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage.

that in default of such payment or any part thereof the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in the mortgage executed by the said Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jesup as trustees be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold as hereinafter directed at public auction, without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXXIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation, or its successors, or assigns or other persons

obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sum of five hundred and seventy-six thousand and fifteen dollars and thirty-three cents, together with interest on said sum from the first day of February 1889, to the date of this decree, at the rate of six per centum per annum; that is to say,

$576,015.33

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the said Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, the sum of five hundred thousand eight hundred and fifty dollars, together with interest on said sum at six per centum per annum from the first day of February 1889 to the date of this decree.

$500,850.

2. for the use and benefit of the holders of the six per cent. scrip certificates based upon coupons from bonds of the Decatur and East St. Louis Railroad Company the sum of twenty thousand three hundred and fourteen dollars and sixty cents, and for the use and benefit of the holders of the seven per cent. scrip certificates based upon coupons from said bonds the sum of eight thousand one hundred and eighty-four dollars and twenty-three cents together with interest on both said sums at six per centum per annum from the first day of February 1889 to the date of this decree.

$20,314.60

$8,184.23

3. for the use and benefit of the holders of the funded debt bonds and coupons based upon coupons from said bonds the sum of forty-six thousand six hundred and sixty-six dollars and fifty cents, together with interest on said sum from the first day

$46,666.50

of February 1889 to the date of this decree at six per centum per annum.

4. that within said time they also pay, or cause to be paid, into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by said mortgage.

that in default of such payment, or any part thereof, the equity of redemption of the defendants, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause of, in and to the property mentioned and described in the said mortgage executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox as trustee, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described be sold, as hereinafter directed, at public auction without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXXIV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation, or its successors, or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, pay or cause to be paid into this court the sums following, that is to say:

1. for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the Wabash Railway Company to Alfred T. White as trustee, covering the property formerly known as the Hannibal and Naples Railroad, the sum of ninety-nine thousand four hundred and fifty-eight dollars and thirty-three cents, together with interest on

$99,458.33

said sum at six per centum per annum from the first day of February 1889 to the date of this decree;

2. that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the costs and expenses of this cause properly chargeable to the property covered by the said mortgage;

that in default of such payments or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles as such purchasing committee as aforesaid, and of all the other defendants in this cause of, in and to the property mentioned and described in the mortgage executed by the Wabash Railway Company to Alfred T. White as trustee, and which property was formerly known as the Hannibal and Naples Railroad, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage and hereinbefore particularly described, be sold as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders by the special masters hereinafter appointed.

XXXV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that within ten days after the entry of this decree the mortgagor corporation, or its successors or assigns or other persons obligated to the payment of the said bonds, or owning the equity of redemption, in addition to the amounts heretofore adjudged to be due upon the divisional first and second mortgages and the consolidated mortgage, pay or cause to be paid into this court the sums following, that is to say:

for the use and benefit of the holders of the bonds and coupons secured by the mortgage executed by the Wabash

Railway Company to Solon Humphreys and Daniel A. Lindley as trustees, the sum of two millions six hundred and seventy-six thousand six hundred and sixty-six dollars and sixty-six cents, together with interest on said sum at the rate of six per cent. per annum from the first day of February 1889 to the date of this decree; $2,676,666.66

that within said time they also pay or cause to be paid into this court a sum of money sufficient to defray the proportion of the costs and expenses of this cause properly chargeable to the property covered by the said mortgage;

that in default of such payment or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, as such purchasing committee, and of all the other defendants in this cause, of, in and to the property mentioned and described in the said mortgage executed by the said Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as trustees, be forever barred and foreclosed, and that all and singular the railroad property, equipment and franchises in said mortgage, and hereinbefore particularly described, be sold as hereinafter directed, at public auction, without redemption, to the highest bidder or bidders, by the special masters hereinafter appointed.

XXXVI.

The periods of ten days herein limited for the various payments are so designated by consent in court of all parties.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in default of the several payments hereinbefore directed to be made, or any of them, the property mentioned

and described in the mortgage or mortgages respectively, as to which such default in payment shall be made shall be sold by the special masters hereinafter appointed, at public auction, without appraisement or redemption to the highest bidder or bidders at the North door of the United States Court House and Post Office building in the City of Chicago in the State of Illinois between the hours of ten o'clock A. M. and five o'clock P. M., on such day as the said special masters shall appoint, or upon such other day or days to which the said special masters shall adjourn such sale or sales.

The said mortgaged property shall first be offered for sale separately as described respectively in each of the hereinbefore mentioned divisional mortgages, and said special masters shall also offer for sale separately the line of railway from Clayton to Camp Point, and the line of railway from Carthage to Elvaston, as described in the consolidated mortgage executed by the Toledo, Wabash and Western Railway Company to James R. Jesup and Isaac H. Knox as trustees.

IT IS FURTHER ORDERED that along with each division above mentioned and with the line from Clayton to Camp Point and with the line from Carthage to Elvaston when separately offered for sale, there shall be offered for sale in connection with the road and property, as a part and parcel of the mortgaged premises, an undivided proportion of the equipment, to be determined by the proportion that the mileage of each said division and said two lines respectively bears to the whole mileage of the road, as hereinbefore in paragraph XIX found and declared.

The proceeds of sale of said divisions and lines respectively and of said equipment shall go together to the lienholders upon such divisions and lines respectively in the order of their priorities as hereinbefore found, but as to the equipment, conditionally and subject to the right, which is hereby specifically reserved, of junior lienholders to assert

and maintain, as they may be advised, their claim upon such proceeds of the said equipment, and in any such proceedings the proceeds and value of the said equipment shall be determined by the schedules of Mark Miller Martin and Joshua B. Barnes, witnesses, given in evidence before the special masters in this cause and attached to their report marked Exhibits 73 and 79 and 115, and the locomotives shown in said last exhibit not being included in the said valuation of Martin and Barnes are hereby, for the purposes of future distribution of the proceeds thereof, valued at eight thousand dollars each.

IT IS FURTHER ORDERED that the said special masters shall accept no bid from any bidder who shall not forthwith if required deposit with them either in cash or in bonds, as a pledge that he will make good his bid, if accepted by the court, the sum of one hundred thousand dollars, which sum so deposited shall be forfeited in case the said bidder shall fail to comply with the terms of sale and the orders of the court in that respect, but shall be applied on account of the purchase money if the said sale shall be approved by this court, and on compliance by such bidder with the said terms of sale and the orders of the court in that behalf. If such deposit be not made immediately the said property may be forthwith offered for sale and resold by the said Special Masters without notice.

$100,000.

IT IS FURTHER ORDERED that such bids shall in each case be accepted by the said special masters conditionally upon the result of the offer of said railways and property as a unit or entirety as hereinafter directed.

IT IS FURTHER ORDERED, that the said special masters after having offered said railways, property and franchises for sale as described in each of the hereinbefore mentioned

divisional mortgages, and the line from Clayton to Camp Point, and the line from Carthage to Elvaston separately, as above directed, shall then proceed to offer the said property for sale as a unit or entirety, and free and clear of liens and incumbrances, viz., as described in the mortgage from the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as follows, viz., "all the railroad, road-bed and right of way of the said Wabash Railway Company extending from the city of Toledo in the state of Ohio through the state of Indiana, and thence into the state of Illinois to Meredosia with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point in the State of Illinois, and with branch of said road from Clayton to the East bank of the Mississippi river at Hamilton in said state, and with branch of said road leading from Decatur in said state to East St. Louis in the same state, together with all the embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables, engine, machinery, cars, tools, rolling stock, lots, lands, buildings and offices, and other things real and personal, at the date of said mortgage owned or used, or that may thereafter have been owned or used by the said Wabash Railway Company in connection with the said railroad and every appurtenant thereto, and all the powers, privileges, franchises and chartered or other rights of the said Wabash Railway Company."

If the highest bid received by the said special masters for the said entire property shall exceed the aggregate amount of the highest bids for the several properties offered separately as hereinabove directed, then the said entire railway property, and franchises as hereinabove described shall be struck off and sold as a unit and entirety to the person making such bid. If the highest bid received by the said special masters for the said entire property shall not exceed the aggregate amount of the highest bids for the several

properties offered separately, then the sale of the said several properties shall become firm, subject only to the rights and power of the court to reject any bids and to retake and resell as herein reserved and provided.

In case all the said property be sold as a unit and entirety the said Special Masters in their report of sale shall bring into court a full record and report of the amounts of the bids made upon the respective divisions as hereinabove provided for the instruction of the court and to enable the court to use the same as a basis for distribution in the further order or orders therefor, and the proceeds in the distribution shall be divided into as many separate parts as there were divisions and lines offered separately, such division being made in proportion to the amounts bid separately on said divisions and lines, respectively, and shall be distributed to the bondholders in the same manner as if said constituent parts had been sold separately.

IT IS FURTHER ORDERED, That also in case of the sale of said property as a unit or entirety the purchaser may be required to deposit with the said special masters in cash or in bonds, nine hundred thousand dollars, as a pledge that he will make good his bid if the same shall be accepted by the court; such deposit shall be forfeited if said purchaser shall fail to comply with the terms of sale and the orders of this court in that respect, but shall be applied on account of the purchase money if said sale shall be confirmed by the court and on compliance by the purchaser with said terms of sale and the orders of this court. If the said deposit shall not be made immediately the said property may be forthwith offered for sale and resold by said special masters without further notice;

$900,000.

IT IS FURTHER ORDERED, that in offering the said property for sale as a unit or entirety, the said special masters may,

in their discretion, omit therefrom the division of said railways and property known as the Hannibal and Naples division, and covered by the mortgage to Alfred T. White, as trustee, together with its proportion of the rolling stock and equipment as found and declared in paragraph XIX of this decree, and if the said special masters shall exercise the discretion hereby conferred, and shall not include said division with the remainder of said railways and property when offered for sale as a unit and entirety, then the bid received for said division and property when offered separately, with its proportion of equipment offered with it as above provided, shall become firm, and said division and property shall be conveyed to such purchaser upon confirmation of such sale, subject, as also hereinbefore specified, to the readjustment of any questions hereafter arising as to said proportion of equipment.

The said special masters shall accept no bid for either of the following four divisions, viz.: the division from Toledo to the Indiana state line, the division running across the state of Indiana, the division running from the state line between Illinois and Indiana to Naples and Meredosia, and the division from Decatur to East St. Louis for a less amount than the full amount of the first mortgage liens as hereinbefore found in this decree, including the amount apportioned to the liens upon such divisions respectively for scrip certificates and funded debt bonds. Nor shall they receive any bid upon the said division running from Toledo to the Indiana state line for a less amount than the full amount of the first and second mortgages thereon, including the amounts apportioned thereto for scrip certificates and funded debt bonds.

And in case no bids shall be made on said divisions or either or any of them for said full amounts, application for further directions and decree in the premises at the foot of this decree may be made summarily and without notice,

and the court reserves to itself the right and power to direct the sale to be made upon such terms and conditions as may then seem proper. The power of the masters for adjournment herein given shall cover power to adjourn the sale a reasonable time to allow of such application to the court and to receive further direction thereon without any further advertisement or notice.

IT IS FURTHER ORDERED that the said special masters shall give public notice of the time and place of such sales by publication thereof at least once a week for four weeks in five newspapers of general circulation, one published in the city of Springfield, Illinois; one published in the city of Chicago, Illinois; one published in the city of Indianapolis, Indiana; one published in the city of Toledo, Ohio, and one published in the city of New York, which notice shall describe the property to be sold in general terms, and shall refer to this decree for a fuller and more particular description thereof, said period of four weeks being designated by consent in court of all parties.

The said special masters may give such further notice of sale in addition to the notice above directed as in their judgment they may think proper.

The said sale may be adjourned by the said special masters at the time and place appointed by them as aforesaid, and said special masters may thereafter from time to time adjourn or postpone said sale, and may without further notice proceed with said sale on any day to which the same may thus have been adjourned. Said sale may also be continued from day to day by the said special masters, if deemed by them necessary.

The right is hereby reserved by the court to reject any bid, and also to retake and resell the said property and premises or any part thereof upon failure of the purchaser to comply with any of the conditions of sale, or any of the orders of the court in that regard. If the court reject any

bid, the purchaser shall receive back any deposit or payment he may have made.

There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase money as the court may direct. The remainder of such purchase price may be paid either in cash, or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the said purchase price were paid by the purchasers in cash, and in all cases in which bonds shall be received by the said special masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon, and in case of the receipt of bonds for security at the time of sale, the said special masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled.

IT IS FURTHER ORDERED that the said special masters shall make report of all their proceedings to this court;

IT IS FURTHER ORDERED that upon the confirmation of the sale by the court and the full payment of the whole of the purchase price therefor, and compliance by the purchaser with the conditions of sale and the orders of the court in that behalf, the said special masters convey to the purchaser or purchasers, or his or their assigns, the premises and property so sold by good and sufficient deed therefor, which said deed or deeds when so executed and delivered shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption except as hereby reserved

of, in and to, all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle said grantee or grantees to the possession thereof;

IT IS FURTHER ORDERED that all questions arising herein as to an accounting between the several different divisions of the said railways for or on account of or in relation to earnings and expenses, and payments heretofore made by the receivers or any of them of coupons on any of the bonds secured by said mortgages upon said divisions, be and the same hereby are reserved, and all disposition of proceeds arising from sales made under this decree shall be made subject to the future settlement and adjustment of all such questions;

IT IS FURTHER ORDERED that the said special masters pay into this court the proceeds of such sale or sales, and that the same remain subject to the further order of this court; and such payment into court may be made in the discretion of the masters by deposit of the same to the credit of the court in such banks or trust companies as may be selected or approved by them.

IT IS FURTHER ORDERED that Bluford Wilson, Esq., of Springfield, Illinois, and A. J. Ricks, Esq., of Cleveland, Ohio, be and they are hereby appointed special masters to execute and carry out the provisions of this decree, and upon confirmation of the sale hereby directed to execute and deliver to the purchaser or purchasers conveyance of the property so sold.

All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court

on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answer of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the Supreme Court of the state of Ohio in the suit brought by said James Compton against The Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected by said lien or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent. per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by

a resale of such property or otherwise as this court may direct.

AND IT IS FURTHER ORDERED AND ADJUDGED, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Comptom, or to prejudice annul or abridge any right, claim, interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis and Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis

and Pacific Railway Company, or any part thereof, or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors either by this court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of The Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the receivers, have been by said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last named court or otherwise.

Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto

or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said receivers, by order of said courts shall be fully paid and discharged.

The provisions aforesaid shall apply to the purchasers of the same under this decree and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation in this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist.

And the court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

W. Q. GRESHAM,
Judge 7th District.
HOWELL E. JACKSON,
Circuit Judge.

Office Supreme Court U. S.
FILED.
JAN 8 1896
JAMES H. McKENNEY,
CLERK.

67-1

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~689~~ 314.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL.

MOTION TO ADVANCE.

JOHN G. MILBURN,
JOHN H. DOYLE,
JUDSON HARMON,
Counsel for Appellant.

JANUARY, 1896.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 689.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL.

MOTION TO ADVANCE.

This case is pending on a certificate of difference of opinion by Judges Taft and Lurton, of the Circuit Court of Appeals for the Sixth Circuit. The action was to foreclose various mortgages upon different portions of what is known as the Wabash railway system, which extended from Toledo, Ohio, into the State of Missouri. James Compton, who had a judgment in the Supreme Court of Ohio declaring a lien upon the portion of the railway in Ohio and directing its sale, was made a party; but before the filing of his cross-petition and before the expiration of the time allowed for filing it, a decree for sale was entered reserving his rights in case his claim should be sustained. A condition was inserted in the decree reciting that as it was rendered in advance of the trial and determination of the issues as to

Compton's claim, if it should be adjudged by the court that his decree and the lien thereby declared were in full force and effect, then the purchaser at the sale of the property covered by such lien should pay to him, within ten days after the entry of a decree in his favor, the amount thereof, $339,920.40, with interest, and in default of such payment that the court would resume possession of the property covered by said lien and enforce such decree by resale of the property or otherwise, as the court might direct.

The property was sold to a reorganization committee representing the other liens. The issues relating to Compton's lien were decided in his favor, but the circuit court refused to award him any relief, except the right to redeem the entire line extending from Toledo entirely through the State of Indiana, by paying two prior mortgages on the portion in Ohio and two on the portion in Indiana, amounting in all to about eight million dollars. He claimed the right to be paid by the purchaser under the condition of the decree, the right of resale of the property in Ohio only, and, if the right to redeem only were to be awarded him, that it should be to redeem the property upon which his judgment was a lien and no more, viz., the Ohio division, upon which there were two prior mortgages.

The questions certified upon the statement of facts set out are—

"First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only?

"Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?

"Third. Is the decree of the circuit court of the United States for the district of Indiana, between the same parties and unappealed from, *res judicata* upon the questions in this court?"

The last question arises from the fact that similar proceedings were had at the same time in the various States into which the lines of railway extended. Compton's claim was founded on certain equipment bonds which, by virtue of the consolidation of the line in Ohio with that in Indiana, became an equitable lien on the entire consolidated line. Compton was made a party to the suit in Indiana as well as to the suit in Ohio, but as his judgment was a lien on the Ohio property only, and that alone was directed by the Ohio court to be sold in satisfaction thereof, Compton appealed from the decree in Ohio, but did not appeal from the decree in Indiana. It was claimed that the decree in Indiana cut off his rights in Ohio, and that they were not saved by his appeal in Ohio alone.

We ask that the case be advanced, because a long pending litigation relating to a widely extended railway system cannot be terminated until the questions reserved are determined, but will then be finally disposed of. The rights asserted by Compton constitute a cloud on the title of the part of the line in Ohio, for which reason counsel for the appellees authorize me to state that they concur in this motion.

The third question presents an important matter of practice in a very common class of cases where liens on an interstate line are foreclosed by contemporaneous proceedings in various circuits.

Notice of this motion has been duly served on counsel for appellees and proof of service filed with the clerk.

JOHN G. MILBURN,
JOHN H. DOYLE,
JUDSON HARMON,
Counsel for Appellant.

JANUARY, 1896.

Office Supreme Court, U. S.
FILED.
OCT 13 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON, APPELLANT,

against

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES,
APPELLEES.

BRIEF ON BEHALF OF THE APPELLANT.

JOHN G. MILBURN,
JOHN H. DOYLE,
JUDSON HARMON,
For Appellant.

OCTOBER, 1896.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON, APPELLANT,

against

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, APPELLEES.

BRIEF ON BEHALF OF THE APPELLANT.

STATEMENT.

In the year 1862 the Toledo and Wabash Railway Company, which owned and operated a railroad extending from Toledo, Ohio, to State Line City, Indiana, issued a series of bonds amounting to $600,000, known as equipment bonds.

That company was organized in the year 1858 by the consolidation of an Ohio corporation known as the Toledo and Wabash Rail*road* Company, owning a line from Toledo to the eastern boundary of the State of Indiana, and an Indiana corporation known as the Wabash and Western Railway Company, owning a line from that boundary to State Line City.

The history of these previous companies and their mortgage liens is as follows:

The first Ohio company was the Toledo and Illinois Railroad Company, which was incorporated in 1853. Its charter authorized the construction of a railroad from Toledo to the western boundary line of Ohio. On September 8, 1853, it made a mortgage (known as the first Ohio mortgage) to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds amounting to $900,000.

The first Indiana company was the Lake Erie, Wabash and St. Louis Railroad Company, which was incorporated in June, 1852, for the construction of a railroad across the State of Indiana from its easterly to its westerly boundary line. On August 1, 1853, it made a mortgage (known as the first Indiana mortgage) to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds amounting to $2,500,000.

In June, 1856, these two companies were consolidated as the Toledo, Wabash and Western Railroad Company.

The consolidated company made a mortgage which was subsequently foreclosed in the circuit courts of the United States for the northern district of Ohio and for the district of Indiana. By the decree of sale the purchaser of the Ohio railroad bought it subject to the first Ohio mortgage and conveyed it to a new Ohio corporation, called the Toledo and Wabash Railroad Company, organized on or about July 1, 1858. On October 15, 1858, that company made a mortgage on its railroad (known as the second Ohio mortgage) to E. D. Morgan, as trustee, to secure an issue of bonds amounting to $1,000,000.

The purchaser of the Indiana railroad bought it subject to the first Indiana mortgage and conveyed it to a new Indiana corporation called the Wabash and Western Railway Company, organized in July, 1858, and that company, in October, 1858, made a mortgage on the Indiana railroad (known as the second Indiana mortgage) to E. D. Morgan,

as trustee, to secure an issue of bonds amounting to $1,500,000.

In November, 1858, these two companies were consolidated under the laws of Ohio and Indiana as the Toledo and Wabash Railway Company, first mentioned, which issued the equipment bonds. The agreement of consolidation provided that all mortgages given by either of the parties "shall be as valid and binding upon the whole of the road—real estate, fixtures, and personal property which may be described in such mortgage—as though the same had been originally executed by such consolidated corporation."

The Toledo and Wabash Railway Company never at any time issued any mortgage bonds or made any mortgage; so in 1862, when it issued the equipment bonds, it owned a railroad extending from Toledo, Ohio, to State Line City, Indiana, the Ohio portion of which, having a separate origin from the Indiana portion, was covered by the first and second Ohio mortgages, and the Indiana portion of which, having also a separate origin, was covered by the first and second Indiana mortgages.

In 1865 the Toledo and Wabash Railway Company entered into an agreement of consolidation with several Illinois companies, and the Toledo, Wabash and Western Railway Company was thereby formed, owning a line of railroad reaching from Toledo to the Mississippi river.

The articles of agreement which formed the basis of this consolidation contain the following provisions:

"Now, therefore, said companies, by their respective directors, agree to consolidate their said roads, property and capital stock, into one company upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads to the stockholders thereof for ratification, to wit, the Toledo and Wabash Railway Company enters into such consolidation on the following basis, namely:

Its capital is	$10,000,000
composed as follows:	
First-mortgage bonds	3,400,000
Second-mortgage bonds.....	2,500,000
Convertible equipment bonds	600,000
Convertible preferred stock	1,000,000
Common stock	2,500,000

* * * * * * *

"It is hereby further agreed that on the terms and conditions above specified the four railroad companies parties hereto do agree each for itself severally, that the several companies named shall be, and they hereby are, consolidated into and form one corporation," etc.

* * * * * * *

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall as to the principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated companies, according to the true meaning and effect of the instrument or bonds by which such indebtedness of the several consolidated companies may be evidenced." (Certificate, p. 3.)

The Toledo, Wabash and Western Railway Company in 1867 executed a mortgage on its entire road to Jesup and Knox, as trustees (known as the consolidated mortgage), for the purpose therein recited, of consolidating into one mortgage debt all of the bonds which were charges upon its property, including the equipment bonds.

This scheme was never carried out, but some $2,500,000 of bonds were issued under the mortgage.

In 1873 the same company made a mortgage (known as the gold mortgage) to the New York Guaranty and Indemnity Company, as trustee. Suits to foreclose this last mortgage were begun in 1875 in Illinois, Indiana, and Ohio, resulting in decrees of foreclosure, and in 1876 the road was sold subject to all previous mortgages *and without prejudice*

to the rights of the holders of the equipment bonds, which were left open. Companies were organized in the States of Ohio, Indiana, and Illinois to take title to the property sold under these decrees in the respective States, and these companies were consolidated in January, 1877, as the Wabash Rail*way* Company.

In May, 1879, the Wabash Rail*way* Company made a mortgage to Humphreys and Lindley, as trustees, to secure an issue of bonds amounting to $2,000,000.

In August, 1879, the Wabash Rail*way* Company entered into an agreement of consolidation with the St. Louis, Kansas City and Northern Railway Company, a Missouri corporation, and thereby the Wabash, St. Louis and Pacific Railway Company was formed, owning a railroad extending from Toledo to Kansas City. In June, 1880, that company made a mortgage to the Central Trust Company of New York and James Cheney, as trustees, to secure an issue of bonds aggregating $50,000,000. (*Id.*, p. 4.)

On February 3, 1880, James Compton commenced a suit in the court of common pleas of Lucas county, Ohio, to establish and enforce a lien on the railroad in the possession of the Wabash, St. Louis and Pacific Railway Company, which had been owned by the Toledo and Wabash Railway Company, in favor of equipment bonds owned by him of the par value of $150,000. The defendants to the suit were The Toledo, Wabash and Western Railway Company, The Wabash Railway Company, The Wabash, St. Louis and Pacific Railway Company, and Jesup and Knox, trustees of the consolidated mortgage made by the Toledo, Wabash and Western Railway Company, and Humphreys and Lindley, trustees of the $2,000,000 mortgage made by the Wabash Railway Company—that is, all the mortgagees of the mortgages executed after the issuance of the equipment bonds and prior to the commencement of the suit. Neither the Farmers' Loan and Trust Company nor E. D. Morgan, trustees of the first and second Ohio mortgages, were made

parties, as the liens of those mortgages were admitted to be prior to any lien of the equipment bonds.

The various defendants having answered, the action proceeded to trial, and in March, 1882, a decree was rendered in that suit sustaining the lien of the equipment bonds and ordering a sale of the railroad in Ohio to pay the amount found due to Compton on his bonds, subject to the prior liens of the first and second Ohio mortgages—*i. e.*, the mortgage to the Farmers' Loan and Trust Company, as trustee, for $900,000, and the mortgage to E. D. Morgan, as trustee, for $1,000,000. The action was appealed by the defendants to the district court, and by that court reserved for decision to the supreme court of the State. In 1888 the supreme court rendered a decree (Compton *vs.* R. R. Co., 45 O. St., 592) sustaining and establishing the lien of the equipment bonds, finding the amount due Compton to be $339,920.40, with interest from May 1, 1888, and directing that in default of its payment within ten days from the entry of the decree the property in Ohio covered by the lien should be sold subject to the first and second Ohio mortgages. The supreme court found that the equipment bonds, upon the consummation of the consolidation whereby the Toledo, Wabash and Western Railway Company was formed, became an equitable lien upon the railroad owned by the Toledo and Wabash Railway Company at the time of such consolidation; that the lien of the bonds was prior and superior to the rights, interests, and liens of all the defendants to the action in and upon the railroad upon which the lien was declared and was prior and superior to the rights and interests of all persons who might have derived any such rights and interests from or through any of the defendants after the commencement of the action; "*but as to all that part of said railroad and property which is situated within the State of Ohio, such lien is inferior and subject, but inferior and subject only to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo and*

Illinois Railroad Company to the Farmers' Loan and Trust Company on the 8th day of September, 1853, for the security of the bonds of that company amounting to $900,000, due as extended August 1st, 1890, bearing interest at the rate of 7 per cent. per annum, payable semi-annually, on the 1st day of February and August in each year, and the other of which was executed by the Toledo and Wabash Railroad Company to Edward D. Morgan, as trustee, on the 5th day of October, 1858, for the security of the bonds of that company amounting to $1,000,000, due on the 1st day of November, 1878, and bearing interest at the rate of 7 per cent. per annum, payable semi-annually, on the 1st day of May and November in each year."

The court thereupon decreed as follows:

"That the said defendants or any of them pay to said plaintiff the said sum of $339,820.40, now due on said bonds owned by the plaintiff as aforesaid, within ten days from the entry of this decree, and if default shall be made in such payment, that an order of sale issue for the sale, as upon execution at law, of all said railroad and real property, together with the structures thereupon and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds, known as equipment bonds, is hereby declared to exist, which is situated in the State of Ohio and the jurisdiction of this court, subject, however, but subject only, to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, and the Toledo and Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the costs of this action as taxed to be paid and the residue of such proceeds to be brought into court to abide its further order herein on the footing of this decree; that before offering the property, hereby directed to be sold, for sale the officer conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of such property subject to the incumbrance and lien of the two mortgages hereinbefore

mentioned, as executed respectively by the Toledo and Illinois Railroad Company and the Toledo and Wabash Railroad Company, subject to which it is directed to be sold, and over and above the lien of such mortgages, according to the amount of the indebtedness secured thereby, as the same shall be ascertained by the officer conducting such sale, with interest computed to the time of the sale."

In 1884 the Wabash, St. Louis and Pacific Railway Company filed a bill in the circuit court for the eastern district of Missouri against the Central Trust Company and James Cheney, trustees, under the $50,000,000 mortgage executed by it, averring its insolvency, praying for the appointment of a receiver, the marshalling of the liens upon its property, and for a sale and a distribution of the proceeds for the benefit of its creditors. Similar bills were filed in the circuit courts for the northern district of Ohio and the other districts through which the railroad ran. Receivers were appointed who took possession of the property and operated it. Shortly afterwards the Central Trust Company and Cheney filed bills to foreclose their $50,000,000 mortgage in the courts of the various States in which the mortgaged property lay. These foreclosure suits were removed to the Federal courts and were consolidated with the so-called insolvency bills first mentioned. The consolidated causes proceeded to decrees for sale in the various jurisdictions. The property was bid off in each court by James F. Joy and others, a purchasing committee under a plan of reorganization entered into by the bondholders. The decrees referred to Compton's suit pending in the supreme court of the State of Ohio and provided that his rights should not be affected, and that any sale of the property thereunder should be subject to such rights and interests as that court should adjudge. They further provided that the sales should be subject to all the mortgage liens prior to the mortgage foreclosed. The sales were affirmed and deeds of the property ordered.

The receivers delivered possession to the purchasers of that part of the railroad west of the Mississippi river.

Whilst the railroad lines in Illinois, Indiana, and Ohio were still in the hands of the receivers, Jesup and Knox, trustees of the above-mentioned consolidated mortgage made by the Toledo, Wabash and Western Railway Company upon its railroad in Ohio, Indiana, and Illinois, instituted actions in the circuit courts for the northern district of Ohio, the district of Indiana, and the southern district of Illinois to foreclose their mortgage and for the appointment of receivers. The defendants were The Wabash, St. Louis and Pacific Railway Company and the purchasing committee at the former sale and others. For convenience we shall speak of these as the Ohio, Indiana, and Illinois suits respectively. The original bill filed in the Ohio suit refers to the bill filed in the Illinois suit, annexes a copy of it, reaffirms its allegations, and alleges that a portion of the mortgaged property is situated in the northern district of Ohio. In April, 1887, answers were filed in the Ohio suit by the Wabash, St. Louis and Pacific Railway Company by Joy and others composing the purchasing committee who bought at the previous sale, and by Humphreys and Lindley, trustees of the $2,000,000 mortgage executed by the Wabash Railway Company in May, 1879.

The bill filed in the Indiana suit was similar in its import to that filed in the Ohio suit, substituting the allegation that a portion of the mortgaged property was situated in the district of Indiana.

The Farmers' Loan and Trust Company filed, about this time, a separate bill in the circuit court for the northern district of Ohio to foreclose the first Ohio mortgage, of which it was the trustee, and also a separate bill in the circuit court for the district of Indiana to foreclose the first Indiana mortgage, of which it was the trustee.

These various foreclosure actions began in the spring of 1887 and remained in abeyance until October, 1888.

In October, 1888, the complainants Jesup and Knox filed an amended and supplemental bill in the Ohio suit making additional parties, including the Farmers' Loan and Trust Company and James F. Joy, who had succeeded E. D. Morgan as the trustee of the second Ohio mortgage; Humphreys and Lindley, trustees, filed a cross-bill for the foreclosure of their mortgage; the Farmers' Loan and Trust Company and James F. Joy, trustees, filed their answers to the complainants' amended and supplemental bill and the cross-bill of Humphreys and Lindley, and a stipulation was entered of record that "the said answers herein shall also be taken and held as cross-bills entitling the respective parties to all the affirmative relief on final decree or otherwise which they would be decreed to receive as upon a separate cross-bill filed against all the parties to this action." At the same time the Farmers' Loan and Trust Company filed an amended bill in its Ohio suit for the foreclosure of the first Ohio mortgage, making James Compton a party. The answer of James F. Joy, the trustee of the second Ohio mortgage, to the complainants' amended and supplemental bill and the cross-bill of Humphreys and Lindley and the Farmers' Loan and Trust Company annexed, obviously by mistake, the second Indiana mortgage, of which he was also the trustee, instead of the second Ohio mortgage, and prayed that the allegations of the answer might be taken as a cross-bill and he be entitled thereon as upon a cross-bill. So in this Ohio suit there were then pending, either by way of original bill, cross-bill, or answers stipulated to be considered as cross-bills, proceedings for the foreclosure of the first Ohio mortgage, the second Ohio mortgage, the consolidated mortgage of Jesup and Knox covering the lines in Ohio, Indiana, and Illinois, and the Humphreys and Lindley mortgage covering the lines in the same States.

Similar proceedings were taken in the Indiana suit, excepting that there the Farmers' Loan and Trust Company sought the foreclosure of the first Indiana mortgage, of which

it was trustee, and James F. Joy sought the foreclosure of the second Indiana mortgage, of which he had been substituted as trustee in the place of E. D. Morgan.

On October 25, 1888, the complainants Jesup and Knox filed an amendment to their amended and supplemental bill in the Ohio suit, setting up Compton's judgment rendered by the supreme court of the State of Ohio, alleging that the decree in a certain suit brought by one David J. Tysen was a bar to its enforcement, and praying that Compton be made a party to the suit and required to answer, and that he be perpetually enjoined from enforcing his judgment or making any sale of the property thereunder. A similar amendment was filed by Humphreys and Lindley about the same time.

On the 26th day of October, 1888, an order was made in the Ohio suit consolidating the suit brought by the Farmers' Loan and Trust Company with the suit brought by Jesup and Knox, trustees, and directing that the consolidated causes proceed under the title of Jesup and Knox, trustees, *vs.* The Wabash, St. Louis and Pacific Railway Company.

On October 27, 1888, an order was made in those suits directing Compton to appear and plead by the 1st day of December, 1888, and that a certified copy of the order be forthwith served upon him.

In November, 1888, Compton filed a motion to set aside the service of the order upon him on the ground that he was a resident of the District of Columbia and was served there, he appearing for the purpose of making such motion only, and that motion was, on the 18th day of March, 1889, overruled. By the same order denying the motion he was given twenty days from the date of its entry in which to plead, answer, or demur, as required by the original order served on him. Demurrers were filed by Compton on or about March 24, 1889, to the complainants' amended and supplemental bill and to the cross-bills filed by the Farmers' Loan and Trust Company and Humphreys and Lindley,

trustees, drawing in question the jurisdiction of the court by reason of the citizenship of the parties, and also its jurisdiction over him as a resident of the District of Columbia. The demurrers were overruled on the same day and Compton was given leave to file his answers on or before April 5, 1889.

The same pleadings were filed in the Indiana suits as to Compton and the same steps were there taken by him as in the Ohio suit, up to this point.

The final hearing in the Ohio, Indiana, and Illinois suits was had at the same time and place, on or about March 23, 1889. It was at that time that Compton's demurrers were overruled. He then objected to the rendering of final decree at that time, on the ground that the issues which were to be raised by his answers to the amendments affecting his judgment and lien had not been tried and determined. The court denied his motion, but protected him by a reservation in the decree, the same decree being entered in each of the suits. That reservation is of vital importance and is here inserted in full:

"And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill, and to the cross-bill of the cross-complainants, Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton, to be filed herein, have not been tried and determined, the court overrules such objection, and the defendant James Compton duly excepts to such ruling and the entry of this decree; but it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the supreme court of the State of Ohio in the suit brought by

James Compton against The Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered, and affected by said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent. per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned by the supreme court of Ohio in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit, and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton and enforce such decree as it may render herein in his favor by a resale of such property or otherwise, as this court may direct.

"And it is further ordered and adjudged that notwithstanding the entry of this decree said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them or any of them, and nothing in this decree shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul, or abridge any right, claim, interest, or lien which the said James Compton may have in, to, or upon the premises hereby directed to be sold or any part thereof, or in, to, or upon any property whatsoever embraced in this decree, it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto." (Certificate, pp. 7 and 8.)

The decree provided that the mortgaged property should first be offered for sale separately, as described respectively in the divisional mortgages, and that afterwards it should be offered as an entirety. If the sum offered for the entire property exceeded the total of the separate bids for the several parts as offered separately, it was to be struck off and sold as an entirety to the person making such bid, and the share of each division in the amount of the unit bid was to be determined in the proportion of the separate bids, but no bid was to be received on the Ohio property which did not equal the sum due on the first and second Ohio mortgages, and no bid was to be received on the Indiana property which did not equal the amount due on the first Indiana mortgage.

Other provisions of the decree are set forth in the certificate at pages 6, 7, 8, and 9.

Among them are the following:

"Any sale, conveyance, or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis and Pacific Railway Company—namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta—or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company or any part thereof or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto or their successors either by this court or by the circuit court of the United States for the eastern district of Missouri, or by any United States court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or by any United States circuit court to which any of the parties in

the consolidated cause of The Central Trust Company of New York and others against The Wabash, St. Louis and Pacific Railway Company and others, in the circuit court of the United States for the eastern district of Missouri, including the receivers, have been by said circuit court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

"Nor shall any such sale, conveyance, transfer, or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken and, if necessary, resold, if the sum so charged or to be charged against said property or any part thereof or said receivers as aforesaid shall not be paid within a reasonable time after being required by the order of this court or said other courts.

"The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts, and the purchasers of the property sold under this decree or any part thereof and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof or said receivers by order of said courts shall be fully paid and discharged.

"The provisions aforesaid shall apply to the purchasers of the same under this decree and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation in this decree contained have the effect or be construed nor are they or any of them intended to give to any claims that may exist any validity, character, or status superior to what they now have, nor to decide or imply that any such claims exist.

"The effect of such provisions and reservations shall be to prevent this decree operating as an additional defense to

claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances, if found and decreed to exist."

At the sale Joy and his associates, the purchasing committee in charge of the reorganization, became the purchasers of the road at their bid of $15,500,000 for the entire property. This exceeded by several thousand dollars the sum total of the bids for the several properties. The separate bid on the Ohio property amounted to $2,840,595.68, or a little more than enough to pay the principal and interest of the first and second Ohio mortgages. The separate bid on the Indiana property was $3,650,000, about $1,300,000 less than the principal and interest due on the first and second Indiana mortgages. The masters who conducted the sale made a report of their proceedings, and the sale was confirmed May 18, 1889.

On June 18, 1889, an order was made directing the master to "make, execute, and deliver to said purchasers a deed or deeds conveying to them or their assigns all and singular the railways, premises, and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause and all the right, title, and interest and estate of all the parties in said cause of, in, and to the same and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed thereof," and the order recited that it was "made subject in all respects to the provisions of said decree of March 23, 1889." (*Id.*, p. 10.)

The purchasing committee organized a new company, called the Wabash Rail*road* Company, to which they conveyed the property.

Within the time fixed, viz., on March 28, 1889, Compton filed his answers in the Ohio suit to the complainants'

amended and supplemental bill and its amendment relating to him, to the cross-bill of the Farmers' Loan and Trust Company, and to the cross-bill of Humphreys and Lindley and the amendment thereof relating to him. In his answers to the complainants' amended and supplemental bill and to the cross-bill of Humphreys and Lindley he put in issue the allegations in the amendments to those bills that the decree in the Tysen suit (better known as the Ham suit) was a bar to the enforcement of his judgment, and in all his answers he pleaded his judgment as rendered by the supreme court of Ohio and his right thereunder to have the Ohio property sold separately to satisfy it.

Compton also filed answers to the complainants' amended and supplemental bill and the cross-bills of Humphreys and Lindley in the Indiana suit.

On August 17, 1889, an order was made in both the Ohio and Indiana suits referring "the issues presented in this cause as to the lien and claim of James Compton made by the various pleadings herein upon and concerning said claim and lien reserved in the former decree herein saving the rights of said Compton" to Bluford Wilson, &c. Thereafter an order was made in the Ohio case granting the Wabash Railroad Company leave to appear therein on the hearing before the special master in the matter of the claim of James Compton, and that it might "take advantage of and use as its own all allegations in the original, amended, or supplemental bills of complaint filed in this cause or in the pleadings of the Farmers' Loan and Trust Company and James F. Joy relating to or bearing upon the matter of said James Compton."

The special master reported that the "issues offered should, on the facts of the record, be determined in favor of Compton, whose judgment remains in full force," and that the purchasing committee or their successor, the Wabash Railroad Company, in accordance with the foreclosure decree of March 23, 1889, subject to which they bought, should be

ordered to pay the whole amount of the Compton judgment and lien, or, in default thereof, the court should sell the railroad and property in Ohio covered by it without requiring him to redeem from the prior mortgages.

The circuit court below sustained the master in holding that Compton's decree was not barred by the decree in the Tysen or Ham case and was in full force and effect, but decided that he had no right to a separate sale or separate redemption of the Ohio property and refused to afford him any relief but that of redeeming by paying both the Ohio first and second mortgages and the Indiana first and second mortgages, which amounted to over $8,000,000. Affidavits were filed on behalf of Compton at the final hearing in the circuit court showing that he was deterred from bidding at the foreclosure sale by the advice of his counsel that the saving clause in the decree in his favor made it unnecessary for him thus to protect his claim, because if his judgment was held to be in force there would be a decree in his favor for the whole amount due him, which the court would enforce by the sale of the property or in some equally effective way, and that but for reliance on the saving clause he was able and willing to make a bid on the sale of the Ohio property high enough to secure the payment of his claim from the proceeds of sale.

The decree of the circuit court was entered by the respective courts in both the Ohio and Indiana suits. From the decree entered in the Ohio suit an appeal was taken by Compton to the United States circuit court of appeals for the sixth circuit. No appeal was taken from the decree entered in the Indiana suit.

The questions certified to this Court are as follows:

(1.) Had Compton the right, under the saving clause of the decree for sale, to a decree for the redemption of the Ohio division only?

(2.) In fixing the amount to be paid in redemption is he

entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?

(3.) Is the decree of the circuit court of the United States for the district of Indiana between the same parties and unappealed from *res adjudicata* upon the foregoing questions in this Court?

The facts bearing on the last question which have not been mentioned can be more conveniently stated in connection with its discussion.

POINTS.

I.

Compton had the right, under the saving clause of the decree for sale, to a decree for the redemption of the Ohio property alone.

It is and has been all along maintained by us that under the saving clause the proper decree was, the issues raised against Compton having been determined in his favor, that the purchaser should pay him within ten days the sum due to him, and that in default of such payment the court should resume possession of the property and resell it if necessary—*i. e.*, if that were the only legal means of enforcing payment. The circuit court held that Compton was not entitled to a resale. The circuit court of appeals has expressed the same opinion, holding that the only relief to which Compton was entitled was the remedy of redemption, Taft, J., holding that he was entitled to redeem the Ohio property alone by the payment of the first and second Ohio mortgages, and Lurton, J., holding that he must redeem the property in Ohio and Indiana as a unit by the payment of the first and

second Indiana as well as the first and second Ohio mortgages. Whether he was entitled to redeem the Ohio property alone we propose now to discuss, reserving for later consideration the question whether Compton was not entitled to a resale of the Ohio property in accordance with the decree of the Supreme Court of Ohio, in default of the payment of his claim by the purchaser.

It will make the case clearer to note the precise issues raised in this cause as to Compton, and the parties by whom they were raised. At the time of the final decree the Farmers' Loan and Trust Company, the trustee of the first Ohio mortgage, by its bill or cross-bill was seeking the foreclosure of that mortgage, which covered the Ohio property only. The only allegation it made as to Compton was the usual general allegation that he claimed some interest in or lien upon the property which was subject to the lien of his mortgage. James F. Joy in his answer, which was to be taken as a cross-bill, pleaded the second Ohio mortgage, covering the Ohio property only, and did not mention Compton at all. The complainants by their bill were seeking to foreclose the consolidated mortgage, covering the railroad in Ohio, Indiana, and Illinois; and Humphreys and Lindley, as trustees, by their cross-bill were seeking to foreclose the $2,000,000 mortgage covering the same property. The amendment relating to Compton, filed by the complainants and Humphreys and Lindley to their bill and cross-bill respectively, presented the issue that the final decree rendered in a certain suit brought by James R. Tysen and others (better known as the Ham suit), which was adverse to the lien of the equipment bonds, was binding on Compton, and was a bar to the enforcement of the decree in his favor rendered by the Supreme Court of Ohio. Their prayer for relief was that he be enjoined from making any claim under his judgment and from attempting to make any sale of the property thereunder. Such was the situa-

tion as to the issues at the time the application was made for a final decree.

(1.) It has been contended that the effect of the decree for sale was to transfer the property to the purchaser free from any claim or lien Compton might have, and that all the saving clause accomplished was to subject the proceeds of the property to his lien, if sustained, in lieu of the property. As this contention may now be made in support of the position that he is not entitled to redeem the Ohio property alone, it becomes necessary to consider it briefly.

Compton had been compelled against his will to appear in this suit and defend his rights, and had been given until April 5, 1889, to file his answers. The other parties to the cause insisted upon an immediate decree for sale, which was entered March 24, 1889, twelve days before his answers were due and four days before they were filed. Upon Compton's objecting to the entry of the decree before the determination of the issues affecting him, an express provision concerning his claim was put in the decree by consent of all parties. The right of the court to make such a provision in ordering a sale before the determination of the issues concerning one of the parties has not been challenged, so that the question is simply one of construction.

All of the security-holders except Compton considered an immediate sale, without waiting for the determination of his rights, to be necessary to the success of their plan of reorganization. The amount of Compton's lien, though large, was insignificant compared with theirs. His objection to a decree for sale at that time, followed up by proper steps, might cloud or at least delay the title acquired by the sale; and that objection was fully met by the provision concerning his lien, which was inserted in the decree to obviate any possible prejudice to him from the premature ordering of the sale. Besides, equity clearly demanded the insertion of such a protective provision, considering that the sale of the

property was being ordered in advance of the adjudication of his rights and the determination of the question as to whether he had any lien.

Had Compton's rights been adjudicated prior to the sale he would have known just what it was necessary for him to do to protect his interests at the sale. He would have known whether his lien existed or not, and, if it did, what property it covered, what rank it held, and the amount of the liens having priority to it. He could then have bid at the sale intelligently and with full and precise knowledge of his rights. He could have bid on the Ohio property separately to the extent necessary to protect his interests, and, even if the property had been sold as an entirety, the amount apportionable to the Ohio property for the satisfaction of the liens upon it would have been determined by the amount of the separate bid for it.

Without his rights being adjudicated, the validity of his lien determined, and its place fixed, it was obviously impracticable for him to be a bidder at the sale. The smallest bid that could be made for the Ohio property was the amount due on the first and second Ohio mortgages, nearly two and a half millions of dollars; and it would have been unreasonable to put Compton in a position which would require him, in order to protect himself, to bid that amount and the amount due on his judgment in addition whilst it was yet unadjudicated whether he had any interest or not. Recognizing this fact, the court inserted in the decree the saving clause in his favor, and its whole purpose and object was to prevent injustice to him from a sale of the property at that time.

That the saving clause would naturally be understood by Compton as relieving him from the usual necessity of lienholders in railroad foreclosures to bid or procure bids upon the property or enter into arrangements to insure such a sale as would protect his lien is apparent. That he did so understand it is made clear by the affidavits of his counsel,

which also show that but for this clause in the decree he was ready and would have been able to take the necessary steps to protect his lien by bidding or purchasing at the sale. That the other parties to the suit and the purchasers so understood it is equally clear. The latter appeared when the order was made referring the issue upon Compton's claim to a master. The purchasers were a committee who transferred their rights to a new company called the Wabash Railroad Company, and it was made a party on its own application, on the ground that, as the owner of the property, it was interested in the claim of Compton to a lien upon a portion of it. If the only effect of the saving clause was to transfer Compton's claim from the property to the proceeds, the purchasers, who had already paid or were bound to pay the proceeds into court, would have no interest whatever in the issue concerning his lien. Furthermore, there was no occasion for any saving clause at all, if all that was intended was to transfer Compton's rights to the proceeds of sale, because his lien, if he had one, would necessarily have attached to such proceeds by mere operation of law.

The provision of the saving clause that if, upon the determination of the issues, it should be adjudged that Compton's decree rendered by the Supreme Court of Ohio and the lien thereby declared and adjudicated in his favor continued in full force and effect, then *the purchaser* should pay him the sum due on his judgment within ten days, and, in default of such payment, that the court should resume possession of the property in order to enforce the decree in his favor is utterly inconsistent with the position that what was intended to be accomplished was merely to remit him to the proceeds of sale for the realization of his claim in case it should be upheld. The same is true of the provision that notwithstanding the entry of the decree the issues concerning the claim and interest of Compton should proceed to a final determination and decree, and

that any decree rendered should bind the *purchaser or purchasers* at the sale had under the decree, and all persons and corporations deriving any title to or interest in the property from or through the purchasers, and *that nothing in the decree should be construed to annul or abridge any right, claim, interest, or lien which Compton might have in the property or any part of it,* "it being the intention to hereby *preserve the rights of said Compton* in the relation in which he now stands towards the mortgagees parties hereto." *Both of these provisions are aimed at and concern the purchaser at the sale and the title he took*, and show conclusively that if Compton's lien should be sustained it was either to be paid by the purchaser as part of the purchase price or enforced against the property itself; that the purchaser was not to take and hold the property free and clear from the lien; and that it was not the intention to transfer Compton's lien to the proceeds of sale exclusively.

This phase of the subject is so exhaustively treated by Taft, J., in his opinion, that any further discussion of it here would be mere repetition. (Certificate, pp. 28–33.)

(2.) If the only relief to which Compton was entitled was the remedy of redemption, he was clearly entitled to redeem the Ohio property alone by the payment of the first and second Ohio mortgages.

The foundation of Compton's rights is the decree of the Supreme Court of Ohio adjudicating that he had a lien on the property which was owned by the Toledo and Wabash Railway Company, which issued the equipment bonds, and appropriating so much of that property as lay in the State of Ohio to its payment, subject to the first and second Ohio mortgages. He was not made a party to this suit as a holder of equipment bonds claiming and asserting a lien, because *as such* he would have had no lien which the court would recognize after the decision in the Ham suit.

For that reason holders of equipment bonds not reduced to decree like Compton's were not made parties, and no holder of such bonds stands in the same position as Compton—*i. e.*, having a final decree adjudicating his lien and directing the sale of specific property for its payment. The issues raised as to Compton herein relate to *his decree* and it alone, not to equipment bonds held by him. The provision of the saving clause is that if it should be adjudged that his *decree* and *the lien thereby declared and adjudicated* continued in full force and effect, then the purchaser was to pay him *the amount thereby adjudged* or the court would resume possession of the property. Thus the source and measure of Compton's rights were the terms of the final decree of a court of competent jurisdiction, binding on the owner of the property and all subsequent mortgagees, adjudicating a lien in his favor for a fixed amount and *his right to a sale of the Ohio property*, subject only to the first and second Ohio mortgages, for its payment. That decree vested in Compton a fixed and definite right to a sale of the Ohio property alone for the full satisfaction of the amount thereby found due on his bonds. In legal effect it was the judicial appropriation of *the Ohio property* to the payment and satisfaction of the amount due him, subject only to the first and second Ohio mortgages.

No other court, we submit, can vary the legal operation and effect of that decree as an appropriation of the Ohio property to the payment of the amount due Compton or treat him as the mere holder of equipment bonds with a lien on the Ohio and Indiana properties, as a unit, enforceable only as against both properties together. The severance of the Ohio property for the payment and realization of his lien has been adjudged by a court of competent jurisdiction, through the medium of a decree, binding on every conflicting interest from its rendition until now.

Three objections are raised to this position, viz. (1) that the portion of the decree relating to the sale of the Ohio

property "pertained to process" and is not within the principle of *res adjudicata* even as to the parties to the suit; (2) that Compton is in the attitude of a complainant in a court of equity seeking to have an ineffective decree rendered effective, and that it is therefore open to re-examination, and (3) that the first and second Ohio mortgagees were not parties to Compton's suit, and the decree is not binding on the Wabash Railroad Company as their successor.

We will consider these objections in the above order:

(*a*) The question resolves itself into this: Was the order of the court directing the sale of the Ohio property alone an essential part of the decree? If so, it will not be denied that it is a binding adjudication against all the parties in every forum.

A diligent search has failed to disclose any authority for separating one part of the action of a court, which it had jurisdiction to take, from the other parts in applying the principle of *res adjudicata*. So far as we can find, no such attempt has ever been made or suggested. No Federal question having been involved, this Court will give full faith and credit to the action of the Ohio court whose jurisdiction over both parties and subject matter is unquestioned. To omit any portion of the language of its decree or refuse to recognize any effect which that decree had on the rights of the parties is to emasculate the decree. In that case it is no longer the decree rendered, but a different one.

The order and direction of the court as to the sale of the property over which its jurisdiction was invoked was an essential part of its decree; in fact it was the essential and operative part. Without it the action of the court would have been the mere finding and attaching of a lien to the property. With it that action became an effective appropriation of the property to the satisfaction of that lien. In the language of Mr. Justice Matthews, it was "equivalent to a seizure." (Heidritter case, 112 U. S., at page 301.)

The enforcement of his lien, which Compton sued for in his case, was a purely equitable remedy (Pom. Eq. Jur., sec. 112). In actions at law the action of the court ends with giving judgment for the amount due. Execution is mere process to be levied on any property pointed out by the judgment creditor. In equitable actions to declare and enforce liens the order for sale of the particular property described in the pleadings is the very object of the suit. It is the equitable right and remedy in one. The question is whether the complainant is entitled to the judicial sale of the property described or any part of it. This distinction is well stated in Kramer *vs.* Rebman, 9 Ia., at page 120.

"Its object is to enforce that lien by a sale of the premises, in order that the proceeds may be applied in satisfaction of the debt." (Pom. Eq. Jur., sec. 1228.)

Therefore the provisions of the decree as to what property shall be sold are necessarily its very essence, and, being the determination of the court in that regard, are not open to collateral attack by any of the parties. This principle was recognized in Bronson *vs.* La Crosse Railroad Co., 2 Black, foot of page 529. The question was whether a decree directing the sale of mortgaged premises was final so as to be appealable:

"*The object of the suit* was to ascertain how much money was due * * * and *to sell the property* unless the amount was paid. The Court did find what was due and *ordered a sale.* The very purpose of the litigation * * * was accomplished, and nothing remained for them to do, if they felt aggrieved by the finding of the Court, but to appeal." (Italics ours.)

On page 529 the court speaks of the order directing the sale as what the court "*decreed*," italicizing the word.

On page 531 the court says:

"When the mortgage was foreclosed *and a sale ordered*, the merits of the controversy were finally settled, and the sub-

sequent proceedings were simply a means of executing *the decree.*" (Italics ours.)

This clearly ranks the order for sale as part of the decree itself and not as mere process.

So in Whiting *vs.* Bank, 13 Pet., at page 15, the court says:

"The original decree of foreclosure and *sale* was final upon the merits of the controversy." (Italics ours.)

Unless the decree *orders a sale* of the property in addition to finding the amount due and adjudging the lien the decree is not complete and final.

"The present decree is not final according to this rule. *It does not order a sale of the property.*" (Grant *vs.* Phœnix Insurance Co., 106 U. S., at page 431.) (Italics ours.)

In Parsons *vs.* Robinson, 122 U. S., p. 112, the amount due had been found and its payment ordered by a day fixed, but while the Court in the decree had "declared its intention of hereafter directing such a sale," yet the Chief Justice said (foot of page 114):

"Here, however, there is as yet no decree of sale. As was said in Railroad Co. *vs.* Swasey, 23 Wall., 405, 409, 'to justify such a sale, without consent, the amount due upon the debt must be determined *and the property to be sold ascertained and defined.* Until this is done, the *rights* of the parties are not all settled.'" etc. (Italics ours.)

And (foot of page 115) this is spoken of as—

"Further judicial action must be had by the court before its ministerial officers can proceed to carry the decree into execution."

On the same page the Chief Justice speaks of *the identification of the property to be sold* and the fixing of the time, place and manner of sale as "the rights of the parties" and

"matters for adjudication." Under Ohio practice all this was done by the Compton decree.

See also Railroad *vs.* Simmons, 123 U. S., where, at page 55, the Chief Justice calls an order to sell as an entirety "the language of the decree."

In Hill *vs.* Bank, 97 U. S., 450, errors were assigned to an order for the sale of property as an entirety decreed below: (1.) That a certain specific lot was included. (2.) That certain machinery was included. (3.) That certain water power was included.

The Court said (p. 452):

"To all three of them there is a common answer. The points are *res judicatæ* between the parties."

In Cornett *vs.* Williams, 20 Wall., at page 249, the Court said in speaking of a proceeding to sell real estate of a decedent:

"Jurisdiction is the power to hear and determine. *To make the order of sale required the exercise of this power.* It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. * * * The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

"A judgment directing a sale of the mortgaged premises is conclusive as to all parties to the suit so long as it remains unreversed." (Jones on Mortgages, 4th ed., sec. 1588).

The parties may appeal from the directions in the decree for carrying it into execution (*id.*, sec. 1600), which could not be true unless they were an essential part of the decree—judicial not ministerial.

"The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it." (2 Daniel Ch. Pr., *p. 1004. See also *id.*, note 7, that the particular property must be specified.)

In Winter *vs.* Eckert, 93 N. Y., 367, the court in speaking of a decree of sale said:

"This judgment remains in full force as a binding adjudication upon all the parties to the action, and conclusively determines as between them not only the necessity and propriety of, but the place and manner of a sale of the property, including the conjunctive sale of the real and personal property therein described, at a place where the presence of the personal property on such sale was entirely impracticable."

The fact that the Ohio court expressly found that Compton's lien attached to both Ohio and Indiana property as an entirety only emphasizes its action in separating the Ohio property for the purposes of its decree. The then owner, as well as the former owners of the entire property, was before the court. Mortgagees of the entire property were also before the court. The court itself represented the State and the public if they had any interest in the matter. All considerations affecting the ordering of a separate sale of the Ohio property were necessarily involved and therefore finally concluded by the action of the court. From and after the entry of that decree it became and was, until the payment of this claim, a new and independent right of Compton. What had been a mere floating equity on undefined property in two States became a debt and lien on specific property in Ohio only—a debt and lien of record of the highest class, with not only judicial sanction but judicial action for its enforcement. It became then just what it would have been if the owner had given him a separate mortgage on the Ohio property alone, for his entire lien, with the assent of all the parties to his case, and he had then secured a decree for foreclosure and sale thereon. Upon the payment of the amount so decreed him his lien on the Indiana property would be gone. Meantime his lien on that property remained as before, a mere floating equity. It might become stale or outlawed. Indiana courts, if ap-

pealed to, might refuse it enforcement because of the different provisions of the consolidation statute of that State, or because they might choose or be bound to follow the Ham decision. It might be lost by sale of the Indiana property to a purchaser without notice. All this could happen without affecting Compton's rights in the Ohio property under his decree. The mere finding of the Ohio court that his lien covered the Indiana property, inoperative *in rem* and not attempted to be made operative *in personam*, was totally ineffective (Carpenter *vs.* Strange, 141 U. S., p. 87). Even if available as *res adjudicata*, which we deny on the authority just cited, it was of no effect without new litigation.

In short, the finding in section 5 of the Ohio decree that Compton's equitable lien had potential operation on the entire property was a mere reason for the judgment and order in section 6 giving it actual operation and effect on part of the property only—a mere premise to the conclusion. That finding can neither broaden nor limit the scope and effect of the decree actually rendered, which never was and never can be either more or less than a decree for the sale of the Ohio property only to pay Compton's entire claim. We submit that the court must give it effect as such, or can give it no effect at all.

We submit, further, that if the court in Compton's case had not actually decreed the sale of the Ohio property, but had stopped with the mere adjudication of a lien upon it for Compton's entire claim, this would have concluded all the parties against questioning in any form his lien of record by judicial decree on the Ohio property alone. This would have been binding as a mere adjudication; but when the court went further and decreed the sale of this specific property alone, without regard to other property, for the payment of Compton's entire claim, it went beyond mere adjudication binding the parties to the existence of facts and naked rights and took operative judicial action for the enforcement of these rights. It not only decided but

stretched forth its hand to execute, so that the parties are bound not only by what the court *decided*, but also by what the court *did;* and as in the view of a court of equity that is regarded as done which it has ordered to be done, the case is the same with respect to the separation of the Ohio property as though the sale ordered had taken place and Compton had bought in the Ohio property to satisfy his claim.

After his decree Compton no longer had an equitable lien on the Ohio property. His lien theretofore existing was, as to that property, merged in his decree. His sole right thenceforth was to sell that property under the terms of that decree. The sole right of the other parties was to pay his entire claim, redeem the Ohio property alone from it, or submit to the sale ordered. If that decree is binding on the parties at all, it is binding as so fixing his rights and theirs in and to the Ohio property alone. If there was any advantage in that, the decree gave Compton that advantage as much as it gave him anything. If there was any disadvantage, the decree imposed that disadvantage on him.

It is scarcely necessary to add that Compton's decree is conclusive as to every question necessarily within the issues, whether actually raised or not.

Cromwell *vs.* County of Sac, 94 U. S., 351.
Stout *vs.* Lye, 103 U. S., 66.
Dimock *vs.* Revere Copper Co., 117 U. S., 559.

(*b*) Compton is not a complainant in this suit, and he is not asking the aid of a court of equity in behalf of an ineffective decree. He was brought into this suit against his will and in spite of his opposition. It was alleged against him that he had a decree the enforcement of which was barred by a decree in another suit alleged to be binding on him. He took issue on that allegation, maintaining that his decree was not barred. The object of the bill and cross-bills was the sale of the property for the payment of the

liens in their order and with respect to the property which they respectively covered. Had the issues as to Compton been tried before the final decree, his Ohio decree would not have been subject to re-examination on the equitable ground now alleged. There was, indeed, not a syllable in the pleadings raising any such question. The situation in this particular is not changed because the sale was ordered prior to the determination of the issues affecting Compton. It is now necessary, under the saving clause, to render a supplemental decree merely that there may be a title passed free and clear from Compton's clair and lien. The issues as to Compton's decree were made up by the pleadings, and if he prevailed, then the saving clause came into operation and provided what the relief should be *in view of the fact that the property had been sold before their determination.* There is not a word in it sanctioning the idea that if the issues were decided in his favor his decree should be subject to a re-examination on the merits upon any ground or for any reason, equitable or other.

The equitable doctrine invoked applies only where a party applies to a court of equity for affirmative aid in the enforcement of an incomplete decree. In what particular is Compton's decree incomplete? It is most specific in every detail and perfectly self-executing. Compton has not sought the aid of this suit to enforce it. Brought into this suit, he was then compelled to defend his decree, and his attitude was and is simply that the property could not be sold free and clear from that decree without his rights under it being recognized and protected, which was done by the saving clause.

(*c*) The Wabash Railroad Company has no standing, as the successor of the first and second Ohio mortgages, to question the effect of Compton's decree as an appropriation of the Ohio property.

The first and second Ohio mortgages covered the Ohio property alone. Their trustees sought in this suit the fore-

closure of those mortgages—*i. e.*, a sale of the Ohio property. They simply alleged, as to Compton, that he claimed an interest in or lien on the property which was subordinate to theirs. The decree found that the mortgage to the Farmers' Loan and Trust Company was the first and best lien on the Ohio property, and that the mortgage of which James F. Joy was the trustee, as successor to E. D. Morgan, was the second lien thereon. Thus the Wabash Railroad Company, the grantee of the purchasers at the sale, is, as the successor in equity of the first and second mortgagees, the assignee of mortgages which were a lien on the Ohio property only. By the saving clause Compton's rights were to be preserved "in the relation which he now stands towards the mortgagees, parties hereto." The first and second mortgagees raised no question as to the property out of which Compton's lien was realizable. They had no interest in that matter, as their liens covered the Ohio property alone and were admitted to be prior to his. Compton's decree did bind the owner of the property, the Wabash, St. Louis and Pacific Railway Company, its predecessors in the title the Wabash Railway Company and the Toledo, Wabash and Western Railway Company and all mortgagees whose mortgages were later in date than the equipment bonds, all of which mortgages covered the railroad in Indiana and Illinois as well as the railroad in Ohio. These parties so bound were the only parties interested in the realization of Compton's lien out of any particular property. The Wabash Rail*road* Company, as their successor in equity, is bound by Compton's decree because they are bound, and as the successor of the first and second Ohio mortgagees no interest passed to it giving it a standing to assail his decree as an appropriation of the Ohio property to the payment of his claim, because that decree was an appropriation subject to their liens which were exclusively Ohio liens.

Furthermore, it would have been perfectly competent for the Toledo, Wabash and Western Railway Company, or the

Wabash Railway Company, or the Wabash, St. Louis and Pacific Rail*way* Company to agree with Compton or with the holders of equipment bonds that the lien of their bonds should be enforced against the Ohio property only, subject to the first and second Ohio mortgages, and the holders of the latter could not have questioned that agreement. The mortgagor does not, by giving a mortgage, restrict his right to convey or encumber the property or his equity of redemption in it (1 Jones on Mortgages, 676; Hodson *vs.* Treat, 7 Wis., 263; Flanagan *vs.* Westcott, 11 N. J. Eq., 264). It therefore follows, as said by Taft, J. (Certificate, p. 40), "that conveyances or decrees binding upon the original mortgagor or his privies with reference to the ownership of the equity of redemption or an interest in it are, with reference to the mortgagee, *res inter alios acta*, which he has no right or concern to impeach or dispute." (See cases cited by him.) The owners of the property or of the equity of redemption being bound by the Compton decree, the first and second Ohio mortgagees, whose liens were absolutely unaffected by it, "had no right or concern to impeach or dispute it," and therefore none passed from them to the Wabash railroad as their successor.

These various objections failing, it follows that Compton's decree is an effective appropriation of the Ohio property to the payment of the amount due him which is binding on every interest in the Ohio property and necessarily entitles him to redeem it separately.

(3.) To the right to redeem the Ohio property alone various technical objections are interposed growing out of the relations of other parties and the nature of the property. They may be summarized as follows:

(*a*) By the consolidation agreement of 1865 the Toledo, Wabash and Western Railway Company became liable to pay, besides the equipment bonds, the mortgage bonds

issued by the Indiana as well as by the Ohio predecessors of the Toledo and Wabash Railway Company. Thereby, it is argued, the Toledo and Wabash Railway Company became a surety for all that indebtedness instead of the principal debtor, and has a right, as such surety, to object to the appropriation of the Ohio property alone to the payment of Compton's claim; which right, upon some unexplained principle, the Wabash railroad can assert.

(*b*) That the same acts which created the lien in favor of the equipment bonds created a similar lien on the property of the Toledo and Wabash Railway Company in Indiana and Ohio in favor of the holders of the first and second Indiana mortgage bonds, and that the latter may object to a separate redemption of the Ohio property by Compton; to which right the Wabash Railroad Company has in some way succeeded.

(*c*) That, as the trustees of the first and second Ohio mortgages are the same persons as the trustees of the first and second Indiana mortgages, the Ohio property cannot be redeemed without the redemption of the Indiana property also; and

(*d*) That it is in conflict with public policy to permit a redemption of part of a consolidated and continuous line of railway.

None of these objections are tenable.

(*a*) The theory of an invasion of the rights of the Toledo and Wabash Railway Company as a surety seems to be very far-fetched.

In 1865 that company made an agreement of consolidation with three other companies, forming the Toledo, Wabash and Western Railway Company. There were at that time outstanding the first and second Ohio mortgage bonds, the

first and second Indiana mortgage bonds, and the equipment bonds. The agreement contained the provision hereinbefore recited (*ante*, p. 7) in relation to the protection of the bonds and other debts in the agreement specified. (The provision cited by Lurton, J., in his opinion at the foot of page 58 of the certificate is not in this agreement.) The Ohio consolidation statute provided that "all debts, liabilities, and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities, and duties had been contracted by it." Hence it is argued that the consolidated company became the principal debtor as to the Ohio mortgage bonds, the Indiana mortgage bonds, and the equipment bonds, and that the Toledo and Wabash Railway Company was thenceforth merely a surety and could resist any redemption by equipment bondholders except of the entire property in both Ohio and Indiana. We shall have to content ourselves with a brief reference to the various answers to this claim.

It is not the relation of principal and surety, but the substitution of one debtor for another, which results from a consolidation of railroad companies. This follows from the nature of the act of consolidation and the legislation authorizing it. Upon the consolidation the constituent companies were dissolved and became *extinct*. This is distinctly the doctrine of Shields *vs.* Ohio, 95 U. S., 319, construing the very act under which this consolidation took place. It is there said:

"The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence."

To the same effect are R. R. Co. *vs.* Georgia, 98 U. S., 359; R. R. Co. *vs.* Maine, 96 U. S., 499; R R. Co. *vs.* Berry, 113 U. S., 465; Shields *vs.* Ohio, 26 Ohio St., 86; Ohio *vs.* Sherman, 22 Ohio St., 411; McMahan *vs.* Morrison, 16 Ind., 172.

The idea that the consolidating companies assume the status of sureties is utterly inconsistent with the fact that by the act of consolidation they part with all their property and become extinct as corporations. The provision in the Ohio statute that "they shall be deemed to be in existence to preserve" the rights of the creditors has no other function than to preserve such rights notwithstanding the dissolution of the debtor and the amalgamation of the properties. A suretyship relation of a corporation which parted with all of its property in 1865 and became extinct at that time is scarcely entitled to weight in determining a right of redemption now.

Furthermore, the Toledo and Wabash Railway Company is not a party to this action, and it is difficult to see how any equity that it might have had as a surety has passed to the defendant. That equity was necessarily personal to the company and could be asserted by it alone. It is not here asserting it. If it was not personal to it, but something that could pass, then to whom has it passed? The only transfer that company ever made was by virtue of the consolidation of 1865, which brought the Toledo, Wabash and Western Railway Company into existence; and if this equity passed by that transfer it passed to the principal debtor, which is scarcely intelligible, and that debtor, the Toledo, Wabash and Western Railway Company, is bound by Compton's decree severing the Ohio property. Its successor, the Wabash Rail*way* Company, is also bound by his decree; so is its successor, the Wabash, St. Louis and Pacific Railway Company, the owner of the property at the time this suit was brought and the property sold under the decree herein. How the purchaser at the sale could by virtue thereof, under such circumstances, succeed to the alleged

equity of the Toledo and Wabash Railway Company as a surety is quite incomprehensible to us. But, we submit, this theory of suretyship has no place in the disposition of the matter before the Court. The debts incurred by these various corporations were subject to the operation of the consolidation statutes. The Toledo and Wabash Railway Company was in no different relation to the bonds secured by the Ohio and Indiana mortgages than were the companies which had executed them. It could have secured the equipment bonds by a mortgage on the Ohio property without the consent of the Indiana bondholders, or *vice versa*. On its consolidation the Toledo, Wabash and Western Railway Company became the sole debtor by substitution, the same, as the statute says, as if the debts "had been contracted by it." The consolidating companies parted with all their property and became extinct so that they could retain no interest of their own controlling the redemption of the property or any part of it from the different liens by the Toledo, Wabash and Western Railway Company, or any other interest.

(*b*) The Wabash Rail*road* Company, as the successor or equitable assignee of the first and second Indiana mortgagees, has no grounds on which to object to Compton's redemption of the Ohio property alone and no standing in this suit as such to object, if such grounds existed.

The argument is that as the consolidation of 1865, whereby the Toledo, Wabash and Western Railway Company was formed, resulted in making the equipment bonds an equitable charge or lien on the whole of the property of the Toledo and Wabash Railway Company, a similar lien was created in favor of the first and second Indiana mortgage bonds, and the Wabash Railroad Company may by reason thereof object to the division of the security which would result from a separate redemption of the Ohio property. To that argument there are several fatal objections:

This alleged lien of the Indiana bondholders is presented

as an original question in this cause for the determination of this Court. Following the Ham case, the Court can only hold that they have no such lien. If Compton's claim of a lien were presented as an original question, the Court would hold that he had no lien. The distinction between the position of Compton and that of the Indiana bondholders is that Compton's claim is founded on the final decree of a court of competent jurisdiction binding the owner of the property and all later lienholders. But for that decree Compton would have no standing in this Court. The Indiana bondholders have no such decree and therefore no equitable lien which the Court will recognize.

But applying the doctrine of the Supreme Court of Ohio in the Compton case (45 Ohio St., 592), there is no analogy between the position of the equipment bondholders and that of the Indiana mortgage bondholders. The equipment bonds were unsecured, and the lien followed from the absorption of all the property of the debtor by a new company owning various lines of railway consolidated into a single system and uniting in itself a mass of obligations originally attached to different corporations. A resulting equitable charge of the unsecured obligations of the original companies on their respective properties is very different from a charge of their bonds secured by mortgages on specific property. The Supreme Court of Ohio has not held that the bonds secured by such mortgages became, as a result of consolidation, an equitable charge on all of the property of the company, including as well that not covered by the mortgages as that so covered, and this Court, in view of the decision in the Ham case, is not likely to sanction any such doctrine.

Furthermore, if the Indiana bondholders had an equitable lien they had also a prior mortgage lien on the Indiana property, which they have enforced against it separately. If the Indiana property covered by their mortgage liens sold for enough to pay the mortgage debts, then they would have

no interest in how Compton should enforce his lien, and the purchaser at the sale could derive no such interest from them. If it did not, then only the Ohio property would be left against which to enforce their equitable lien for the deficiency. "How can they, then," in the language of Judge Taft (Certificate, p. 47), "object to Compton's resort to the Ohio division to enforce his lien when that is all they propose to leave him by foreclosing their prior mortgages on the Indiana division? Surely they cannot prevent Compton from taking the only part left of the common security which they themselves divide by the appropriation of the other part under their prior mortgages."

But when and in what manner did this alleged equitable lien of the Indiana bondholders pass to the purchasers at the foreclosure sale, so that the Wabash Railroad Company may assert it, even assuming that it has a standing in this suit as the assignee in equity of the first and second Indiana mortgages? The purchasers at the sale, treating them as equitable assignees, became such only as to the mortgages foreclosed (Brobst *vs.* Brock, 10 Wall., 519; Childs *vs.* Childs, 10 Ohio St., 339; Stark *vs.* Brown, 12 Wis., 572; Johnson *vs.* Sandhoff, 30 Minn., 197; Brewer *vs.* Nash, 16 R. I., 462). In the Indiana suit the Farmers' Loan and Trust Company, as trustee of the first Indiana mortgage, and James F. Joy, as trustee of the second Indiana mortgage, sought only the foreclosure of those mortgages. The mortgage liens alone were pleaded. The decree found them to be respectively the first and second mortgage liens on the Indiana property. There were no allusions in the pleadings or in the decree to the equitable lien now asserted. The pleadings and the decree are certainly conclusive as to what liens were foreclosed, and it is of those liens only that the purchasers became the equitable assignees if the sale was ineffectual as to an outstanding lien. The equitable lien, if there be one, belonged to the bondholders, and they have not parted with it. They have parted with their

mortgage lien, but that is all. The consideration bid at the sale was for the mortgage liens only, as they alone were involved in the suit. To the extent that there was a deficiency and the bonds are unpaid, the equitable lien, if it exist, might be available to the bondholders as a security for the unpaid portion of their bonds. That lien of the bondholders, if there be such lien, they still retain for their own benefit, and the purchasers at the foreclosure sale have no claim upon it, and as to it there is no relation of privity between them or the Wabash Railroad Company and the bondholders. Having sold the Indiana property in the enforcement of their mortgage liens, the bondholders could not, of course, afterwards enforce against it an inferior equitable lien existing in favor of the same debt; but that reason does not apply to other property, and there is therefore no transfer of the equitable lien to the purchasers by way of estoppel.

A final answer is that the Wabash Railroad Company has no standing in this suit as the equitable assignee of the Indiana mortgagees to assert any rights it may have acquired from the Indiana mortgagees through the sale on the foreclosure of the Indiana liens. The jurisdiction of the court in this case was confined to the foreclosure of the Ohio mortgages and of the interstate mortgages to the extent that they covered Ohio property. In like manner the jurisdiction of the Indiana court was confined to the foreclosure of the Indiana mortgages and of the interstate mortgages to the extent that they covered Indiana property. Though the same decree was entered in each case, it is operative in each district only to the extent of the jurisdiction of the court—that is, as to the property within the district and the foreclosure of liens upon that property (Mercantile Trust Company *vs.* Kanawha and Ohio R'y Co., 39 Fed. Rep., 337; Toland *vs.* Sprague, 12 Peters, 300, 327; Northern Indiana R. R. Co. *vs.* Michigan Central R. R. Co., 15 How., 233, 242). No suit was brought in any jurisdiction on the

basis of Muller *vs.* Dows, 94 U. S., 444, for the foreclosure of all the liens through the medium of a decree operating *in rem* as to the property within the jurisdiction of the court and *in personam* as to the property without. No such relief was prayed in this or in any of the suits and no such decree granted, which was essential to give any one suit that operation and effect (Carpenter *vs.* Strange, 141 U. S., 87, 106). Hence by the decree, so far as it was the decree of the circuit court for the western district of Ohio rendered in this suit, there were foreclosed only the Ohio mortgages and liens on the Ohio property, and the purchasers under it acquired only the Ohio property; or through the purchase under it became the equitable assignee only of the Ohio mortgages and of the other mortgage liens to the extent that they affected Ohio property; and as a party to this suit the Wabash Railroad Company has only the status which the acquisition of those rights and liens gave it. It has no standing here as a purchaser under the decree to the extent that it was a decree of the Indiana court foreclosing Indiana mortgages and liens on indiana property. This subject is treated with such lucidity and unanswerable force by Judge Taft in his opinion (pp. 44, 45) that it is unnecessary to elaborate it further here.

It is worthy of comment that nowhere in any pleading before the court in this suit is there a syllable as to any equitable lien of the Indiana bondholders or mortgagees or as to any rights or interests of theirs of any kind.

(*c*) No extended discussion would seem to be necessary of the claim that because the trustees of the first and second Ohio mortgages and the trustees of the first and second Indiana mortgages are the same persons, the property covered by all these mortgages must be redeemed as a unit because of the principle "that where several mortgage debts have become consolidated, so that the obligor in each is the same and the mortgagee the same, though secured on distinct estates,

mortgage lien, but that is all. The consideration bid at the sale was for the mortgage liens only, as they alone were involved in the suit. To the extent that there was a deficiency and the bonds are unpaid, the equitable lien, if it exist, might be available to the bondholders as a security for the unpaid portion of their bonds. That lien of the bondholders, if there be such lien, they still retain for their own benefit, and the purchasers at the foreclosure sale have no claim upon it, and as to it there is no relation of privity between them or the Wabash Railroad Company and the bondholders. Having sold the Indiana property in the enforcement of their mortgage liens, the bondholders could not, of course, afterwards enforce against it an inferior equitable lien existing in favor of the same debt; but that reason does not apply to other property, and there is therefore no transfer of the equitable lien to the purchasers by way of estoppel.

A final answer is that the Wabash Railroad Company has no standing in this suit as the equitable assignee of the Indiana mortgagees to assert any rights it may have acquired from the Indiana mortgagees through the sale on the foreclosure of the Indiana liens. The jurisdiction of the court in this case was confined to the foreclosure of the Ohio mortgages and of the interstate mortgages to the extent that they covered Ohio property. In like manner the jurisdiction of the Indiana court was confined to the foreclosure of the Indiana mortgages and of the interstate mortgages to the extent that they covered Indiana property. Though the same decree was entered in each case, it is operative in each district only to the extent of the jurisdiction of the court—that is, as to the property within the district and the foreclosure of liens upon that property (Mercantile Trust Company *vs.* Kanawha and Ohio R'y Co., 39 Fed. Rep., 337; Toland *vs.* Sprague, 12 Peters, 300, 327; Northern Indiana R. R. Co. *vs.* Michigan Central R. R. Co., 15 How., 233, 242). No suit was brought in any jurisdiction on the

basis of Muller *vs.* Dows, 94 U. S., 444, for the foreclosure of all the liens through the medium of a decree operating *in rem* as to the property within the jurisdiction of the court and *in personam* as to the property without. No such relief was prayed in this or in any of the suits and no such decree granted, which was essential to give any one suit that operation and effect (Carpenter *vs.* Strange, 141 U. S., 87, 106). Hence by the decree, so far as it was the decree of the circuit court for the western district of Ohio rendered in this suit, there were foreclosed only the Ohio mortgages and liens on the Ohio property, and the purchasers under it acquired only the Ohio property; or through the purchase under it became the equitable assignee only of the Ohio mortgages and of the other mortgage liens to the extent that they affected Ohio property; and as a party to this suit the Wabash Railroad Company has only the status which the acquisition of those rights and liens gave it. It has no standing here as a purchaser under the decree to the extent that it was a decree of the Indiana court foreclosing Indiana mortgages and liens on indiana property. This subject is treated with such lucidity and unanswerable force by Judge Taft in his opinion (pp. 44, 45) that it is unnecessary to elaborate it further here.

It is worthy of comment that nowhere in any pleading before the court in this suit is there a syllable as to any equitable lien of the Indiana bondholders or mortgagees or as to any rights or interests of theirs of any kind.

(*c*) No extended discussion would seem to be necessary of the claim that because the trustees of the first and second Ohio mortgages and the trustees of the first and second Indiana mortgages are the same persons, the property covered by all these mortgages must be redeemed as a unit because of the principle "that where several mortgage debts have become consolidated, so that the obligor in each is the same and the mortgagee the same, though secured on distinct estates,

there can be no separate redemption against the will of the mortgagee." We do not deem it necessary to examine that principle on its merits or to determine whether it has any place in the jurisprudence of this country at this time. We are relieved from the minute investigation which such an inquiry would involve by what seems to us to be its obvious inapplicability to the facts of this case. In the first place, there was not the same mortgagee. The Farmers' Loan and Trust Company was the trustee of the first Ohio mortgage and of the first Indiana mortgage, but for different bondholders, and in determining this question of identity we have to look behind the trustee to the beneficiaries, who are the real parties in interest. It is the substance, not the form, which governs in equity; the real party in interest is considered, not the nominal party. The same is true of Joy, the trustee of the second Ohio mortgage and of the second Indiana mortgage. Each as trustee of an Ohio mortgage and as trustee of an Indiana mortgage is a different person in law. When the same person is executor of two estates there is not identity of ownership; neither is there such identity when the same person is trustee of two separate estates. Had the Farmers' Loan and Trust Company resigned as trustee of one of the first mortgages or James F. Joy as trustee of one of the second mortgages and successors had been appointed, there would obviously have been no such identity. Does not this show most clearly the inapplicability of the principle to such a situation as that now presented?

Moreover, Compton's decree, which, as we have seen, was binding on every interest in the Ohio property, severed that property for the payment of the amount due Compton, and as that was a severance operative as to the Farmers' Loan and Trust Company, as trustee of the first Ohio mortgage, and Mr. Joy, as trustee of the second Ohio mortgage, they can certainly have no standing as trustees respectively of the first and second Indiana mortgages to defeat the opera-

tion of that decree on any theory of their identity as trustees of both mortgages. If there were identity, then what was operative upon them as to one trusteeship was operative as to both.

(*d*) The claim that it is in conflict with public policy to permit a redemption of part of a consolidated and continuous line of railway has no application to the severance of the Ohio property by a separate redemption, the right to which grows out of a decree of a court of competent jurisdiction which was charged with the protection of the public interests. It is argued that Compton should be held to a redemption of the entire railroad in Ohio and Indiana. Is not that also part of a consolidated and continuous line of railway? The railroad of the Wabash Railroad Company extends far west of Indiana. To redeem either the Ohio property alone or the Ohio and Indiana property together would be only a partial redemption, and the argument has no more weight against the one course than against the other. Besides, the decree in this suit severed the property in each State. The Ohio property was to be offered separately as well as the Indiana property, and it was only in the event of the bid for the property as an entirety exceeding the aggregate of the separate bids that it was to be sold as an entirety; otherwise it was to be sold separately.

Courts will, of course, not separate railway property used as an entire line where it can fairly be avoided, but when it is necessary to do so in order to preserve and enforce the rights of creditors, they always separate it in cases where there has been consolidation. This is too common a practice to need reference to instances. The lien of Compton's decree is on the Ohio property alone, and all proceedings to enforce it by sale, redemption, or otherwise must be limited to that property. It is a mere denial of justice to require him to redeem an enormous railway system to save a lien for $350,000 on a small part of it. The cases cited in the

there can be no separate redemption against the will of the mortgagee." We do not deem it necessary to examine that principle on its merits or to determine whether it has any place in the jurisprudence of this country at this time. We are relieved from the minute investigation which such an inquiry would involve by what seems to us to be its obvious inapplicability to the facts of this case. In the first place, there was not the same mortgagee. The Farmers' Loan and Trust Company was the trustee of the first Ohio mortgage and of the first Indiana mortgage, but for different bondholders, and in determining this question of identity we have to look behind the trustee to the beneficiaries, who are the real parties in interest. It is the substance, not the form, which governs in equity; the real party in interest is considered, not the nominal party. The same is true of Joy, the trustee of the second Ohio mortgage and of the second Indiana mortgage. Each as trustee of an Ohio mortgage and as trustee of an Indiana mortgage is a different person in law. When the same person is executor of two estates there is not identity of ownership; neither is there such identity when the same person is trustee of two separate estates. Had the Farmers' Loan and Trust Company resigned as trustee of one of the first mortgages or James F. Joy as trustee of one of the second mortgages and successors had been appointed, there would obviously have been no such identity. Does not this show most clearly the inapplicability of the principle to such a situation as that now presented?

Moreover, Compton's decree, which, as we have seen, was binding on every interest in the Ohio property, severed that property for the payment of the amount due Compton, and as that was a severance operative as to the Farmers' Loan and Trust Company, as trustee of the first Ohio mortgage, and Mr. Joy, as trustee of the second Ohio mortgage, they can certainly have no standing as trustees respectively of the first and second Indiana mortgages to defeat the opera-

tion of that decree on any theory of their identity as trustees of both mortgages. If there were identity, then what was operative upon them as to one trusteeship was operative as to both.

(*d*) The claim that it is in conflict with public policy to permit a redemption of part of a consolidated and continuous line of railway has no application to the severance of the Ohio property by a separate redemption, the right to which grows out of a decree of a court of competent jurisdiction which was charged with the protection of the public interests. It is argued that Compton should be held to a redemption of the entire railroad in Ohio and Indiana. Is not that also part of a consolidated and continuous line of railway? The railroad of the Wabash Railroad Company extends far west of Indiana. To redeem either the Ohio property alone or the Ohio and Indiana property together would be only a partial redemption, and the argument has no more weight against the one course than against the other. Besides, the decree in this suit severed the property in each State. The Ohio property was to be offered separately as well as the Indiana property, and it was only in the event of the bid for the property as an entirety exceeding the aggregate of the separate bids that it was to be sold as an entirety; otherwise it was to be sold separately.

Courts will, of course, not separate railway property used as an entire line where it can fairly be avoided, but when it is necessary to do so in order to preserve and enforce the rights of creditors, they always separate it in cases where there has been consolidation. This is too common a practice to need reference to instances. The lien of Compton's decree is on the Ohio property alone, and all proceedings to enforce it by sale, redemption, or otherwise must be limited to that property. It is a mere denial of justice to require him to redeem an enormous railway system to save a lien for $350,000 on a small part of it. The cases cited in the

brief do not at all conflict with the well-settled practice, not of breaking a railway up into separate pieces of land and chattels, thereby destroying its identity, but of treating as still separate railways which have been consolidated when that course is required to protect *bona fide* rights; and no such severance of the property will in fact take place if the purchasers are held to the terms of the decree, under which they bought this property at a nominal price compared with the amount at which they forthwith proceeded to capitalize it. (See Poor's Manual for 1891, p. 566, which shows the stock and funded debt to be $130,000,000.) This suggestion of injury to the public interests is a mere bugaboo.

(4.) We close the discussion of this subject with a reassertion of the claim that the decree rendered on the determination of the issues raised in Compton's favor should have been for the payment *by the purchaser* of the amount due him, and in default of payment for the resale of the Ohio property. If the Court should approve of that view, may it not so answer the first question certified or take whatever step may be necessary to secure to Compton the decree to which he is entitled?

(*a*) The saving clause provided that if Compton's decree should be adjudged to be in full force and effect the purchaser at the sale should pay to him a sum specifically stated, and in default of such payment the court should resume possession of the property affected by the lien and "*enforce such decree as it may render herein in his favor* by a resale of such property or otherwise as this court may direct." We submit that these provisions, inserted by common consent to secure a sale without waiting for the trial of the issues as to Compton, were intended to and did give to him the right to receive from the purchasers the amount of his lien if his decree should be held to be in full force and effect. That certainly is the plain meaning of the

language—the purchasers or their successors in the title "shall pay to said James Compton or his solicitors, within ten days after the entry of the decree herein, the sum of," &c. All parties were willing to pay that price, if necessary, to avoid the delay which would otherwise ensue. They hoped to escape such payment by defeating Compton's lien. The language used was specific and carefully chosen. The exact sum he was to receive was stated. The time within which payment was to be made was fixed. In default of payment the court was to retake the property at all events; and for what purpose? By a resale of the property, or in some other way, *to enforce the decree it should render in his favor.* Thus there was to be a decree in his favor, and possession was to be taken of the property in default of payment as a means of its enforcement. This certainly gave Compton very different rights from the general right to redeem which he would have had if not made a party at all, and from the right to mere distribution in order of priority which he would have had as a matter of legal operation without any saving clause. If the only right intended to be secured for him was to participate in the proceeds of the sale, it was unnecessary to say anything in the decree further than to provide for the future trial of the issues. So, if as an alternative the right intended to be secured for him was the redemption by him on paying the full amount of prior liens, no provision in the decree was necessary to preserve it, as it would follow as a legal result. If it was a right of redemption that was in the minds of the court and the parties, and the intention was to preserve it by an express provision in the decree, apt language would have been used, of which there is none. Unless the saving clause is construed as giving Compton the right to receive the amount due him from the purchasers in ten days, and in default of payment the court should resume possession of the property as a means of enforcing a decree in his favor—*i. e.*, enforcing such payment—it is wholly meaningless and unnecessary, and the only purpose it has served has been to lull

Compton into security to his own destruction. But for it he could for the protection of his rights have bid himself when the Ohio property was offered separately, or have procured others to bid, or have bought the property in his own interest. Requiring him within a short time to redeem by paying over $8,000,000, together with all taxes, and without crediting him with any earnings which the purchaser may have made, was simply to mock him by finding his lien just and lawful but denying him any remedy for its enforcement. We insist that Compton is entitled on the showing made either to have the purchaser compelled to observe the obligation to pay his claim, subject to which the sale was made, or to have the property retaken, as expressly provided in the decree. Nothing is more distinctly settled than that the purchaser is strictly bound by the saving clauses and reservations in the final decree.

Blossom *vs.* R. R. Co., 1 Wallace, 655.
Central Trust Co. *vs.* Locomotive Works, 135 U. S., 207.
Kneeland *vs.* American Loan Co., 136 U. S., 89.
Swann *vs.* Wright's Executors, 110 U. S., 590.
Swann *vs.* Clark, 110 U. S., 602.

According to this view, the decree in favor of Compton should be (1st) for the payment by the Wabash Railroad Company within ten days of the sum specified in the saving clause, and, (2d), in default of payment, for the redelivery of possession of the Ohio property to the court and a resale of it for the satisfaction of all the liens upon it according to their priority. A resale is necessary and proper because there is no fund in court produced by the sale of the property already had available for Compton's claim. If there were the decree in Compton's favor could be enforced by the direction of its satisfaction out of such fund. Apart from that, there is no way of enforcing a decree in Compton's favor for the amount due on his lien except-

ing by a sale of the property. The saving clause is binding on all parties, and no one can object to giving it effective operation according to the letter and spirit of its true meaning and purpose. Only by a resale in default of payment is Compton's decree of the Supreme Court of Ohio observed and executed and the rights under it respected and preserved. It converted a general equitable lien into a fixed right to a sale of the Ohio property. The decree regarded as a lien is an adjudicated lien, or a lien of record, on the Ohio property only. This suit concerns Ohio liens only, and the court having found that Compton's decree is in full force it is proper and preservative of the saving clause that the measure of Compton's relief should be the right of sale which his decree gave. If it be said that a resale is a radical measure, the answer is, *it only becomes necessary through the default of the present owner to pay an obligation imposed upon it by the decree under which it has taken title.* It is avoided by complying with the decree and making the payment. It knew that payment was to be made if a certain contingency happened. The contingency has happened, and if there is a resale it is due to its default and no other cause.

See Farmers' Loan and Trust Co. *vs.* Newman, 127 U. S., 649.

We wish to emphasize the point that if our construction of the saving clause is the true one, that consideration is final because *it* is binding on all parties and all interests. In other words, if a resale is essential as a means of enforcing a decree in Compton's favor made necessary by the purchaser's default, all parties have consented to it.

(*b*) This position is reinforced by a consideration of Compton's rights, treating the saving clause as simply retaining the lien of his decree on the property sold and securing to him the same right to enforce it as if he had not been a party to this suit. If the standing of Compton

is that of a lienor whose rights have not been cut off by the foreclosure, and the saving clause operates simply to make those rights the measure of his relief, then we say it is a rule of property in Ohio, which the Federal courts follow, that the right of the lienor in that position is to *foreclose and sell and not to redeem* (Stewart *vs.* Johnson, 30 Ohio St., 24). In that case it appeared that a first mortgage had been foreclosed and the purchaser at the foreclosure sale was in possession. A junior mortgagee was not made a party. It was held that he was entitled to foreclose his mortgage and resell the property without redeeming from the first mortgage. The case is precisely in point. It establishes a rule of property in Ohio. It is not exceptional with Ohio; it exists elsewhere and is the true rule (Moulton *vs.* Cornish, 138 N. Y., 133). Being a rule of property in Ohio, it is incumbent on the Federal courts to follow it (Orvis *vs.* Powell, 98 U. S., 176; Brine *vs.* Ins. Co., 96 U. S., 627). Hence, construing the saving clause most favorably for the appellee consistently with its preservation, the rule of property in Ohio that a junior lienor whose lien is not cut off by a foreclosure sale is not required to redeem, but is entitled to a judicial sale for the satisfaction of his lien, is a *controlling* consideration, requiring a sale of the property in the jurisdiction of this court for the satisfaction of Compton's lien.

(*c*) The relief of redemption is precisely the relief given in a suit of strict foreclosure. That is a remedy afforded under certain circumstances to a purchaser at a foreclosure sale to compel the holder of a lien subsequent to the mortgage foreclosed to redeem, or in default of redemption lose his lien. That remedy has been pronounced "*unusual, exceptional, and severe.*" In the American and English Encyclopedia of Law (vol. VIII, pp. 186, 187; title, Foreclosure) it is stated that strict foreclosure is very rarely resorted to in the American courts; that in a large majority of the States it is not recognized; that in two it is the usual mode of procedure,

and that in six of the States it is permitted in exceptional cases. A history of the remedy is given in the recent case of Moulton *vs.* Cornish (138 N. Y., 133), where it was held that the purchaser can only maintain the action when he purchased in good faith, relying upon the regularity and sufficiency of the proceedings, and when the lienor had knowledge of the sale and permitted the purchaser to buy without disclosing the existence of his incumbrance or calling attention to the defect in the proceedings. It can scarcely be the true construction of this saving clause, carefully inserted for the protection of Compton's rights, that he should be made the victim of this "unusual, exceptional, and severe remedy."

(*d*) Judge Taft in the court below was adverse to the right of resale for the reason that the supreme court of Ohio in Compton's case declared a lien in favor of all the equipment bonds, and that a sale should not be had except in a suit for the benefit of all equipment bondholders (Certificate, p. 59). That, we submit, is not an exact view of Compton's relations to the other equipment bondholders or of their situation and rights. Compton's suit was not a representative suit and no objection was taken to it on that ground. It is true that the Ohio supreme court as a premise or finding stated that the equipment bonds by virtue of certain transactions became a lien on the property which was owned by the Toledo and Wabash Railway Company at the time of the consolidation. That finding was merely preliminary to the relief granted and was not at all essential, as the essence of the decree was the relief granted. That relief was that the defendants pay to the plaintiff the amount due him and him only, and in default that the Ohio property be sold. No other person was entitled to the benefit of that decree, and it is not available to any other equipment bondholder as an adjudication. That has been recognized, and no other

person has ever been made a party to it. In the saving clause in the final decree in this suit the reservation was in favor of Compton alone and the amount due him. No other equipment bondholder has a lien which the Federal courts will recognize, considering the decision in the Ham case (114 U. S., 587), and the jurisdiction of the circuit court is paramount as to any claim of a lien on their part. Hence they are not made parties to this suit, because in a Federal jurisdiction they had no lien and, as it is claimed, could never maintain one in derogation of the decree in this suit. Compton was saved only by his decree. Thus a resale will not have the effect anticipated by Judge Taft—that is, that the title conveyed to the purchaser would be subject to the lien of the other equipment bondholders of uncertain amount, thereby impeding the sale and reducing the price, and there is no valid objection to a resale on that ground.

II.

Upon the second question certified to this Court, to wit, "In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?" we have the conviction that the views presented by Judge Taft are unanswerable.

With almost unbroken uniformity since the case of Cockes *vs.* Sherman, Free. Ch., 13, decided by Lord Chancellor Finch, the rule has been, as stated in sections 1395 and 1396 of Jones on Mortgages, that the purchasers at a sale under a decree of foreclosure of a mortgage where there is a junior lienholder who is not bound by the decree is treated, as against such junior lienholder who seeks to redeem, as assignee of the mortgage, and his possession will be regarded as the possession of the mortgagee upon the question of his liability to account for rents and profits.

It seems to us that it is an inconsistency, under the circumstances of this case, to require us to redeem, or to allow us to redeem, from the prior mortgages, and then hold that the parties from whom we are to redeem are to be treated as mortgagees for the purpose of obtaining interest upon the mortgage debt, but mortgagors or successors to the estate of mortgagors for the purpose of avoiding liability for rents and profits.

While the receivers were in possession at the suit of the mortgagees (which was the mortgagees' possession, Miltenberger *vs.* Ripley, 106 U. S., 286), the rents and profits were applicable to the mortgages in the order of their priority, and hence went to the reduction of the amount due upon the first mortgage.

This possession by the receivers, under the strong reservations and limitations in the decree of sale in this case, and which sale was to be wholly without prejudice to the rights of the other lienholders, has been in effect transferred to the mortgagees and their assignees, the present purchasing company.

The provision in the decree quoted by Judge Lurton in the beginning of his opinion, and the other strong reservations and limitations in the decree certainly show that it was not the purpose of the court to invest the mortgagees or the purchasers at the sale, whoever they might be, with any new or distinct defense or right which grew out of the purchase as against the other parties to the suit whose rights were preserved. It certainly was not the intention or result to convert the purchaser into the owner of the equity of redemption for the purpose of releasing him from accountability for rents and profits when the junior lienholder comes to redeem, but to permit him to stand as mortgagee for the purpose of collecting interest on his mortgage and thus increasing the amount required to redeem.

We have been often reminded and agree that we are still in the same suit and in the same court in which the prop-

erty was sold, that it is a court of equity, and that it is called upon now and at all times to enforce the equitable rights of the parties and execute the decree which it rendered according to its true purpose and intent.

We need not quote here the provisions of the decree, which are found fully set out in the statement of facts. By the decree and sale the property was not withdrawn from the jurisdiction of the court, but its power and jurisdiction over the property for all purposes of the suit were fully preserved. The court was careful to provide that the decree and a purchase under it should arm the purchaser with no new weapon of defense or claim, and we think it is a violation of the terms and spirit of the decree to give it the effect of investing the purchaser with the dual character of owner to escape liability for rents and profits (which would mean that his mortgages were paid, and that Compton's lien thereby became first), and that of mortgagee with a surviving mortgage upon which to collect interest as against the parties entitled to redeem. We cannot escape the feeling that Judge Lurton, in the opening paragraph of his opinion, gives undue importance and a strained construction to the concluding sentence of the paragraph in the decree of sale, which relates to Compton's claim, and which is: "It being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees, parties hereto," in construing the provision of the decree of sale which relates to our claim, but wholly overlooks it when he comes to the question whether the purchasers have a right to collect interest from us on the mortgage debt and at the same time carry away the net earnings without accounting for them.

In these features the case is clearly distinguished from Catterlin *vs.* Armstrong, 79 Indiana, 514, and Renard *vs.* Brown, 7 Nebraska, 449, which are the only two cases cited, or which we have been able to find, which throw any doubt upon the correctness of the position taken by Judge Taft

on this question. These cases are against the uniform line of authorities, and, so far as we know, stand alone, if they are to be held as sustaining Judge Lurton's opinion.

In the Catterlin case the question was not presented to the court at all, and all that was said on this question was entirely unnecessary to the decision of that case. What was decided in that case was that a junior mortgagee is not bound, and his rights are in nowise affected, by the foreclosure of a senior mortgage, unless he was made a party; that in such case the junior mortgagee is under no obligation to redeem from the first mortgage, but that he has the right to foreclose his junior mortgage without redeeming, citing to that proposition Hosford *vs.* Johnson, 74 Indiana, 479, and the cases therein cited. "The complaint," in that case says the court, "was not a bill to redeem; it was a complaint by a junior mortgagee to foreclose his mortgage. * * * The appellee therefore, had a right to foreclose his mortgage; his complaint was sufficient for that purpose;" and the court thereupon says that all that is said in the complaint upon the subject of redemption from the first mortgage and on the subject of rents and profits is surplusage (see page 523); and the opinion in that case, on pages 522 and 523, which covers the point discussed, shows that, having determined that the junior mortgagee had a right to foreclose his mortgage and that his complaint was sufficient for that purpose, the court held that he was under no obligation to redeem. The question of rents and profits being treated as surplusage and not involved in the case, the single remark of the court, based on Renard *vs.* Brown, 7 Nebraska, 449, was entirely unnecessary, and nothing more than a loose statement of the judge writing the opinion. The only authority cited is the Nebraska case.

The court in the Nebraska case reached the conclusion that under the sale at the foreclosure of the senior mortgage in that case and the statute of Nebraska which is quoted (General Statutes, 656) the purchaser took the title of the

mortgagor and hence the possession of the mortgagor, and was not liable to the junior mortgagee for rents and profits, unless it should be shown to the court that the security was insufficient and a receiver should be appointed. (See second paragraph of the head-notes, page 449, and the opinion of the court, page 454.)

While the court cites authorities to sustain the proposition that the mortgagor is not required to account for rents and profits while in possession, and that the equity of redemption is subject to sale by the mortgagor or by execution or decree against him, no authorities are cited to support the proposition that the mortgagee in possession under a foreclosure which does not bar the junior lienholder is not liable in an action to redeem for rents and profits while in possession.

Notwithstanding all that the court said in the opinion in that case, its decree was nothing more or less than a decree of foreclosure, with the right to the first mortgagee to redeem from the second mortgagee, because it directed that unless the purchaser in possession under the first mortgage pay the amount of the second mortgage the property be sold and out of the proceeds of the sale the amount of the first mortgage be paid and the amount of the second mortgage out of the surplus, if any.

The case can hardly be regarded as a reliable authority. It stands alone, so far as we can find, both in the principles announced and in the method of working out their results. But we may well claim that even in these two cases, if the court had taken possession of the property by its receiver in the suit of the first mortgagees, and had the junior mortgagees or lienholders before it as parties, and had, at the instance of the first mortgagees, decided to sell the property in advance of and pending an adjudication of the rights of the junior lienholders, but without prejudice to those rights, still retaining the jurisdiction and control of both the parties and the property for the purposes of enforcing the

liens of the junior lienholders, with such limitations upon the rights of the purchaser at the sale as are found in this decree, there would have been no finding that the purchaser was in possession as owner for the purpose of carrying away the net income of the property, but in possession as mortgagee, for the purpose of increasing the amount required to redeem by adding interest to the amount of the mortgage debt.

It would be a queer kind of equity, it seems to us, under the peculiar facts of this case, where the junior mortgagee is not required to redeem from the first mortgagee at all because of the statute law of the States as well as the rule adopted by the courts of Ohio and Indiana, which have made it the settled law and a rule of property in both States, to hold that there should not only be imposed upon Compton the duty to redeem as a condition precedent to the enforcement of his lien, but that this very harsh rule should be adopted to increase the amount he is required to pay for such redemption while the parties in whose favor it is enforced are permitted to carry off the net income and rents and profits of the property for five or six years without accounting for them to any one.

In the case of Gray *vs.* Nelson, 77 Iowa, p. 63, cited in the opinions of both of the judges below, the court say (see p. 67), plainly recognizing the principle for which we contend:

"It is true that a senior mortgagee, who takes possession of the mortgaged premises under a sale in foreclosure, will, on redemption by a junior lienholder who was not a party to the foreclosure proceedings, be required to account for the rents and profits during the time the possession was thus held (Ten Eyck *vs.* Casad, 15 Iowa, 524; Bunce *vs.* West, 62 Iowa, 80, and cases there cited). But that rule has no application to this case. If James Nelson had foreclosed his mortgage, or if he had taken possession under his mortgage without more, the claim of defendants that rents should be deducted from the mortgage would be within the

rule of the cited cases. But he held the possession of the land as a purchaser. He actually paid to the mortgagor the sum of thirty-two hundred dollars for his equity of redemption, an amount largely in excess of the rents and profits. Before a mortgagee in possession can be required to account for rents and profits, he must be reimbursed for all costs and expenses and money fairly and in good faith paid to obtain possession of the subject of the mortgage."

In addition to the authorities cited by Judge Taft upon this question, the following Ohio authorities appear to us pertinent:

McArthur *vs.* Franklin, 16 Ohio State, 193. The facts in this case appear in the previous report of the case by the same title in 15 Ohio State, p. 485. On January 21, 1842, Allen C. McArthur and Olive, his wife, united in a mortgage to the Bank of Circleville of certain lands to secure the payment of $6,000. On November 2, 1842, the condition of the mortgage being broken, the mortgagee filed a bill in chancery against them, praying for a foreclosure of the equity of redemption and sale of the mortgaged premises. While Olive McArthur was named as a defendant in this bill, no process was ever served upon her; but due process having been served upon the husband, who was the owner of the fee, a decree was rendered in April, 1843, finding $6,546 due, and directing that in default of its payment the property should be sold. Under this decree the property was sold at judicial sale to one Joseph Olds. The sale was confirmed and a deed made. Olds afterward conveyed the premises to a bank, and that bank conveyed them to the defendant Franklin. Olds and his grantees went into possession of the property and enjoyed the rents and profits. Allen C. McArthur being dead, the plaintiff, his widow, Olive McArthur, filed her bill to redeem and to be endowed in the premises.

In the first case, 15 O. S., it was held that she was enti-

tled to redeem, and a demurrer to the answer to her bill was sustained and the case remanded for trial.

In the second case the question arose as to the terms of such redemption, and after considering other questions in the case the court took up the question of rents and profits, and we quote the fourth and sixth propositions of the syllabus, which under Ohio practice was prepared by the court and is the exact statement of the points decided:

"The purchaser having acquired and entered into possession under the title of both the mortgagor and mortgagee, is to be regarded as the mortgagor and mortgagee occupying the mortgaged premises in common, according to their respective interests. And regarding the price paid at the judicial sale as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage, at the time of the sale, bears to the price at which the land was sold."

"The plaintiff not having been a party to the foreclosure suit, is entitled to have the account taken in the same manner as if no decree had been rendered. Therefore, in ascertaining the amount due on the mortgage debt, there should be no rest made at the time of the rendition of the decree."

See also the following from the opinion of the court, commencing on page 207 (the italics are ours):

"It is claimed on behalf of the defendant, that during the life of the husband, he is not to be treated as a mortgagee in *possession;* and is not liable to account till the plaintiff filed her petition.

"His possession must have been either that of mortgagor or mortgagee, or of both. If he held as mortgagor up to the time of filing the petition, we do not see how, at that time, the character of his holding is to be changed. As mortgagor, he was, in respect to the mortgage, the debtor; and not accountable for rents. By giving him this character alone, we have the interest on the whole mortgage debt increasing, undiminished by rents, while the holder of the mortgage is in fact in the receipt of the rents. As against him, in that character, the plaintiff is entitled to full dower without redeeming the mortgage. It is only by setting up the mort-

gage that he can resist the claim for dower. *He cannot set up the mortgage to resist dower, and yet, when the plaintiff seeks to redeem, drop it, to resist accounting for rents.* The petition against the defendant is founded upon the mortgage to enforce the plaintiff's equity to redeem; and while the defendant claims under the mortgage, it seems to us he must account as a mortgagee; and that his possession is to be referred to the titles under which he entered. By the judicial sale the purchaser acquired the interests of both the mortgagor and the mortgagee and stands in the shoes of both. His rights are to be regarded as the same under this purchase, as if the mortgagee had assigned him the mortgage in consideration of the payment of the amount then due thereon; and the mortgagor had conveyed to him his equity of redemption, in consideration of the payment of so much of the purchase-money as was not required to pay the mortgage. The purchase-money not applied to pay the mortgage debt, was applied to pay judgments against the husband, and thus went to his benefit. It is the same, in effect, as if it had been paid to him directly. Having thus acquired the title of both and entered into possession, the purchaser and those claiming under him are to be regarded as the mortgagor and mortgagee occupying the mortgaged premises in common.

"For the proportion of rents received as mortgagor the defendant is not liable to account to the plaintiff, but for that received as mortgagee, we think, he is. Considering the price paid at the judicial sale as representing both interests, the defendant will be required to account for such a proportion of the net annual rents as the amount due on the mortgage, at the time of the sale, bears to the price at which the land was sold.

"In ascertaining the annual rents, the enhanced value of the land, arising from improvements made by the defendant, and those under whom he claims, other than ordinary repairs, should be excluded. Taxes and ordinary repairs will, of course, be credited to the defendant in ascertaining the net rents.

"We are of opinion that, as between the plaintiff and the defendant, there should not be a rest made at the time of the rendition of the decree, nor at the time of the confirmation of the sale. She, not having been a party to the suit, is entitled to have the account taken in the same manner as if no decree had been rendered."

This case sustains the proposition of Judge Taft that it is not consistent with equity to permit such purchaser to maintain, against a junior encumbrancer seeking to redeem, that he is receiving the rents and profits as the owner of the equity of redemption rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior encumbrancer to a first lien.

This case has been accepted as the law of Ohio and has been a number of times referred to and approved.

In the case at bar the purchase price paid at the foreclosure sale was only the amount due upon the first and second mortgages on the Ohio division, and the purchaser paid nothing that went to the mortgagor, and which, therefore, under the rule in some of the cases cited, he would be entitled to retain from the rents and profits.

Since the decree in Compton's favor in the Ohio court, there never has been any question about his having a lien upon the Ohio property; that lien is, at least from the date of the process served upon the defendants in that case, which was in 1880, a *legal* lien. It was as effective, subject, but subject only, to the two prior mortgages, as though it had been a mortgage by the railroad company and all other parties interested, duly executed and recorded. The equitable lien which existed in Compton's favor prior to his suit to enforce it became, by the decree, as of the date of the process in 1880, a legal lien, as much as any trust deed or mortgage executed by all of the parties to that suit would have been. This is the rule in equity without any statute, but it is enacted in section 5055, Revised Statutes of Ohio.

Both members of the court below agree that Compton has the *same* right, under the saving clause in the decree of sale, "to enforce his lien as if he had not been a party to the proceedings."

But the court, laying its hands on the decree of the court of last resort in Ohio, say in effect:

"That decree is binding, in full force, and we have no power to review it, but we will not permit its enforcement according to its terms, and according to the established law of the State that permits the foreclosure of a junior lien and the sale of the property under it without redemption, but will compel Compton to redeem from these prior mortgages, which, notwithstanding the sale in the foreclosure proceedings, we hold to be still valid securities in the hands of the purchaser for the purpose of such redemption."

We insist that under this state of the case, if there was nothing in the decree limiting the rights of the purchaser, under the overwhelming weight of authority a court of equity would compel the purchaser to account for the rents and profits, in an accounting as to the amount due on the mortgages which the junior lienholder was compelled to pay in redemption. But, giving the purchaser here the place that the strong reservations in this decree intended to give him, the question, it seems to us, is relieved from all doubt and embarrassment.

III.

Compton is not estopped from prosecuting this appeal by the fact that a decree similar in its terms with the one here appealed from was entered in the United States circuit court for Indiana and has not been appealed from.

There was neither identity of issues, controversies, or parties between this suit and the suit in the circuit court for the district of Indiana. This identity is necessary before a decree in one suit can be a bar or an estoppel, and the principle is fundamental (Bigelow on Estoppel, 5th ed., p. 80). When another judgment is invoked as a bar the court always scrutinizes the precise issues in each case. It looks beyond the form to the substance (Freeman on Judgments, p. 244). The first step here is to ascertain the issues in both cases.

(*a*) The object of this suit was to foreclose Ohio mortgages and other mortgages, so far as they were a lien on Ohio property. The jurisdiction of the court was confined to the property within the District. Compton was made a party by virtue of the operation of his decree on the property within the jurisdiction of the court. The Supreme Court of Ohio, in Compton's case, adjudged and decreed that the property in Ohio should be sold separately for the satisfaction of the amount due Compton, subject to the first and second Ohio mortgages. The moment that decree was rendered it vested a new right in Compton relating exclusively to the Ohio property. It was a right to a judicial sale of that property, severed from the Indiana property, for the satisfaction of his lien. It was a specific and definite right created by and originating in a judicial decree. So far as the property in Ohio was concerned, he no longer had a mere equitable lien. It was then merged in the decree, which was the source and measure of his rights.

It was Compton's decree and the rights it created with respect to the Ohio property which were involved in this suit, and the only issue tendered by the pleadings filed against it was that his decree was inoperative because superseded by the Ham decree. If the parties who tendered that issue prevailed, Compton's decree and its lien and the severance it directed of the Ohio property were defeated. If he prevailed, the lien of his decree and that severance of the Ohio property and its appropriation to the payment of his claim were valid and subsisting.

(*b*) Let us now turn to the Indiana suit. That was a suit to foreclose the consolidated mortgage, brought in that State because a part of the railroad covered by it was in Indiana. Consolidated with it was the suit to foreclose the first Indiana mortgage, covering exclusively the railroad in Indiana. Involved in it were the foreclosure of the second Indiana mortgage, covering exclusively the Indiana prop-

erty, and the foreclosure of the Humphreys and Lindley mortgage.

Compton was made a party to that suit. He was made a party to bar and cut off any lien he might have on the Indiana property. The only lien that he had on that property, if he had any, was an ordinary equitable lien under the consolidation of 1865. He had brought no suit in Indiana on his bonds and had no decree of an Indiana court adjudicating his lien and directing the sale of the Indiana property, as he had in Ohio as to the property in Ohio. The issues tendered as to Compton's rights in that suit could concern only the question whether or not he had an equitable lien *on the Indiana property* under the consolidation of 1865, and, if he had, the relief to which he was entitled *as to the Indiana property.* Such an issue was very different from the issue concerning Compton's rights involved in this suit. The validity of Compton's Ohio decree *as a judicial severance of the Ohio property* and the appropriation of it through the medium of a judicial sale to the payment of his debt was not and could not be an issue in the Indiana suit. All that can be claimed is that the operation of the finding in Compton's decree, as a judicial adjudication that he had an equitable lien on the Indiana as well as on Ohio property under the consolidation agreement, could and might be drawn in question in the Indiana suit. A few words will make this clearer.

The finding in Compton's decree that the equipment bonds were a lien on the railroad in Ohio and Indiana did not have any extra-territorial effect, and did not therefore in and of itself operate to establish a lien on the Indiana property. It has been argued that that adjudication in the decree conclusively established, *as between the parties,* that Compton had a lien on the Indiana property, and he could avail himself of that adjudication to enforce a lien on the Indiana property. Proceeding on that theory, the issue was tendered in the Indiana suit that Compton's decree was barred

by the Ham decree, and did not therefore have any effect as an adjudication that Compton had a lien on the Indiana property. If the parties who tendered that issue in Indiana prevailed, its determination would simply be a decision that Compton did not have a lien on the Indiana property, because, with his decree out of the way, the court would have followed the Ham case. If the determination was that he had a lien through the operation of his decree as a conclusive adjudication, the question would then arise as to what relief he was entitled *with reference to the Indiana property, and nothing more.* Upon that question Compton's decree severing and directing a sale of the Ohio property could have no possible bearing. The decree in the Compton case did not contain any provision for its enforcement against the Indiana property; hence it was not in any sense an adjudication of the relief or remedy to which Compton was entitled in Indiana. The effect of the finding in the decree as an adjudication that he had a lien on the Indiana property might be a question or issue arising in the Indiana suit, while the effect of the decree itself severing and appropriating the Ohio property to the payment of Compton's debt and the lien of that decree on Ohio property, as distinguished from a mere equitable lien, were not and could not be questions or issues in the Indiana suit.

Compton in his answers in the Indiana suit insisted that the Indiana property should be severed and sold separately, subject to the first two Indiana mortgages. No claim was made that his decree severed and appropriated the Indiana property to the payment of his debt.

Rightly or wrongly, the court determined in the Indiana suit that Compton had a lien on the property in Indiana, the finding in his decree being treated as a binding adjudication to that effect. That was not an adjudication from which Compton could appeal, because it was in his favor. It did not follow from the finding of the Ohio court in the Comp-

ton case that the Indiana court was bound to find that Compton had a lien on the Indiana property (Carpenter *vs.* Strange, 141 U. S., p. 87). Compton's decree did not make provision of any kind for its enforcement against the property in Indiana. It did not direct an act of any kind to be done by the parties with a view to its enforcement against the property in Indiana. The question was, therefore, according to the doctrine of Carpenter *vs.* Strange, an open one in Indiana, whether Compton had a lien on the Indiana property or not, notwithstanding the finding to that effect in his decree in Ohio. But the issue in the Indiana suit was whether or not he had an equitable lien on the Indiana property, and the result of the decision in his favor was only to establish that he had such a lien.

Having found that he had this lien, the only question left in the Indiana suit was the relief to which he was entitled *quoad* the property over which that court had jurisdiction. The decree was that he must redeem. In determining that question there was no decree severing the Indiana property and directing a judicial sale of it to be taken into consideration. In that respect there was a fundamental difference between the issue in the Indiana suit and the issue in this suit.

Thus what the court had to decide in this case was the relief to which Compton was entitled *quoad* the property within its jurisdiction in view of the decree of the State court severing the Ohio property and directing its sale for the satisfaction of Compton's debt, binding on everybody interested in the property who had any standing in court to question such severance; while the question to be decided by the Indiana court was the relief to which Compton was entitled *quoad* the Indiana property with reference simply to an equitable lien thereon and without any decree in his favor severing the Indiana property and directing a judicial sale of it. It is surely obvious that an adjudication of the relief to which Compton was entitled in the Indiana

suit *quoad* the Indiana property could not possibly determine or affect the relief he was entitled to in this suit *quoad* the Ohio property.

(*c*) The doctrine of Muller *vs.* Dows, 94 U. S., 447, is invoked, but it has no application here. No suit was brought in one jurisdiction to foreclose all the mortgages on the railroad property as an entirety. There would have been enormous difficulties in the way of foreclosing all these mortgages—some exclusively on the Ohio property, some exclusively on the Indiana property, some exclusively on the Illinois property, and others covering the railroad property in more than one state—through the medium of one suit and a decree operating immediately upon the property within the jurisdiction of the court, and only upon the parties as to the property without the jurisdiction of the court in the form of directions to execute conveyances and releases. It was doubtless because of these difficulties that a separate suit was brought in each state. Each suit was an entirely distinct and independent one and related only to the property within the jurisdiction of the court in which it was brought (Mercantile Trust Company *vs.* Kanawha & Ohio R'y Co., 39 Fed. Rep., 337). There was no effort or attempt in any of the suits to make all the parties interested in any part of this railroad property parties, or to adjudicate all their rights, or by decretal provisions operating upon the parties to marshal, enforce, foreclose, or bar liens on the property outside of the jurisdiction of the court. Had a single suit been brought for that purpose, with Compton a party to it for the purpose of adjudicating his rights in the property in Indiana as well as in the property in Ohio, all of his rights would have been involved in the suit and the decree would have passed upon them, which he could have accepted or appealed from, as he was advised; but when, instead of this, separate suits were brought at the same time and he was

made a party to the suit in Ohio and also a party to the suit in Indiana, quite a different situation was presented, and the result was that the suit in Ohio involved his rights and remedies as to the Ohio property, while the suit in Indiana involved his rights and remedies as to the Indiana property. It is difficult to see how the adjudication in the Indiana suit as to his remedial rights concerning the Indiana property could be a bar as to his remedial rights concerning the Ohio property.

It is absurd to say that Compton was made a party to the Indiana suit to adjudicate not only his rights to the Indiana property, but also his rights in the Ohio property, and was made a party to the Ohio suit to adjudicate his rights in the Indiana property as well as in the Ohio property. If we treat the suits as entirely separate and independent, as they in fact were, each relating exclusively to the real property within the territorial jurisdiction of the court in which the suit was brought, to the liens upon it, and to the rights of the lienholders with respect to it, all confusion disappears.

The most that can be claimed is that the decree in the Indiana suit is a conclusive adjudication of Compton's rights, primary and remedial, in the Indiana property, and that the decree in this suit is similarly conclusive as to his rights in the Ohio property. The adjudication of his rights involved in the Indiana suit, so regarded, cannot be treated as an adjudication of his rights with respect to the Ohio property. The vital principle of estoppel by *rem adjudicatam*, viz, that having once been litigated to final judgment the subject cannot be reopened, cannot apply where the parties themselves have divided the subject-matter of their litigation and conducted separate suits contemporaneously, even though they might have united all in a single suit. In such cases there is no prior adjudication. The judgments in Ohio and Indiana were entered at the same time. Each might have been satisfied, appealed from, or set aside

without in anywise affecting the other, because the separation of the litigation necessarily extended to all its stages.

(*d*) The true rule on this subject is stated with great precision by a very able judge (Finch, J.) in Palmer *vs.* Hussey (87 N. Y., p. 306). It is there said:

"The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name, but in fact and substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not, if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language or by a common form of expression, then the truth is not excluded, and the judgment no answer to the different issue."

In a recent case in California (Brill *vs.* Shiveley, 29 Pac., 324) the principle is clearly stated. The case related to a mortgage on two tracts of land which the mortgagee was seeking to foreclose on one tract only. It was claimed that he was barred by a decree in a former suit to foreclose as to the other. But the court said:

"The plaintiff's mortgage embraced two tracts, one of which only was involved in that action. The other was as much outside of that action as if it had been mortgaged to the plaintiff in a separate mortgage."

We have shown that the issue in the Indiana suit as to Compton was not the same as the issue in this suit. We say further that all that was determined in the Indiana suit, apart from the question whether Compton had a lien on the Indiana property, was what relief he was entitled to with respect to that property; and an adjudication as to what relief a party is entitled to with respect to property

made a party to the suit in Ohio and also a party to the suit in Indiana, quite a different situation was presented, and the result was that the suit in Ohio involved his rights and remedies as to the Ohio property, while the suit in Indiana involved his rights and remedies as to the Indiana property. It is difficult to see how the adjudication in the Indiana suit as to his remedial rights concerning the Indiana property could be a bar as to his remedial rights concerning the Ohio property.

It is absurd to say that Compton was made a party to the Indiana suit to adjudicate not only his rights to the Indiana property, but also his rights in the Ohio property, and was made a party to the Ohio suit to adjudicate his rights in the Indiana property as well as in the Ohio property. If we treat the suits as entirely separate and independent, as they in fact were, each relating exclusively to the real property within the territorial jurisdiction of the court in which the suit was brought, to the liens upon it, and to the rights of the lienholders with respect to it, all confusion disappears.

The most that can be claimed is that the decree in the Indiana suit is a conclusive adjudication of Compton's rights, primary and remedial, in the Indiana property, and that the decree in this suit is similarly conclusive as to his rights in the Ohio property. The adjudication of his rights involved in the Indiana suit, so regarded, cannot be treated as an adjudication of his rights with respect to the Ohio property. The vital principle of estoppel by *rem adjudicatam*, viz, that having once been litigated to final judgment the subject cannot be reopened, cannot apply where the parties themselves have divided the subject-matter of their litigation and conducted separate suits contemporaneously, even though they might have united all in a single suit. In such cases there is no prior adjudication. The judgments in Ohio and Indiana were entered at the same time. Each might have been satisfied, appealed from, or set aside

without in anywise affecting the other, because the separation of the litigation necessarily extended to all its stages.

(*d*) The true rule on this subject is stated with great precision by a very able judge (Finch, J.) in Palmer *vs.* Hussey (87 N. Y., p. 306). It is there said:

"The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name, but in fact and substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not, if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language or by a common form of expression, then the truth is not excluded, and the judgment no answer to the different issue."

In a recent case in California (Brill *vs.* Shiveley, 29 Pac., 324) the principle is clearly stated. The case related to a mortgage on two tracts of land which the mortgagee was seeking to foreclose on one tract only. It was claimed that he was barred by a decree in a former suit to foreclose as to the other. But the court said:

"The plaintiff's mortgage embraced two tracts, one of which only was involved in that action. The other was as much outside of that action as if it had been mortgaged to the plaintiff in a separate mortgage."

We have shown that the issue in the Indiana suit as to Compton was not the same as the issue in this suit. We say further that all that was determined in the Indiana suit, apart from the question whether Compton had a lien on the Indiana property, was what relief he was entitled to with respect to that property; and an adjudication as to what relief a party is entitled to with respect to property

in one jurisdiction can have no binding force as to the relief he is entitled to in another suit affecting property in another jurisdiction when the facts on which his right to relief are founded differ in the two jurisdictions.

JOHN G. MILBURN,
JOHN H. DOYLE,
JUDSON HARMON,
For Appellant.

OCTOBER, 1896.

Office Supreme Court, U. S.
FILED
OCT 20 1896
JAMES H. [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON,
Appellant,
against

JAMES R. JESUP and EDWARD H. DIXON, Trustees,
Appellees.

Brief on Behalf of Wabash Railroad Company.

RUSH TAGGART,
HENRY CRAWFORD,
For Wabash Railroad Company.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1895.

Supreme Court of the United States.

JAMES COMPTON,
Appellant,

vs.

JAMES R. JESUP and EDWARD H. DIXON, Trustees, *et al.*,
Respondents.

The questions certified to this Court by the Circuit Court of Appeals grow out of a very complicated state of facts. A clear statement of the facts in order is therefore necessary.

Statement of Facts.

The original companies issuing the divisional mortgages, which figure in this case, were organized in the year 1853. The company in Ohio, the Toledo and Illinois Railroad Company, was organized to build a railroad from Toledo to the west line of the State of Ohio. To procure means to build this road it executed in 1853 a mortgage to the Farmers' Loan and Trust Co., of New York, and issued bonds to the amount of $900,000, securing them by the mortgage upon its railroad, made or to be made. The Lake Erie, Wabash and St. Louis Railroad Company was organized in the same year in the State of Indiana to build the

line of railroad in that State. Its mortgage upon the division owned by it secured bonds to the amount of $2,500,000, which were duly issued and sold. After the making of these mortgages by each of these companies, the two were consolidated in 1856. By the consolidation agreement the consolidated company expressly assumed as its own obligations all the obligations of the constituent companies. The consolidated company executed a second mortgage upon its property, and under this mortgage foreclosure sales took place in 1857. These foreclosure sales were separately had in Ohio and Indiana, and as a result the property in each State was sold by order of the United States Court and deeded to individual purchasers, who in turn conveyed to new companies formed in each State.

These new companies in Ohio and Indiana each executed a mortgage to E. D. Morgan, trustee, the one in Ohio being for one million, and the one in Indiana for $1,500,000. Three days before the execution of these mortgages an indenture was made by each of these companies which provided for the assumption by the companies respectively of all the bonds outstanding under the first mortgages issued in 1853. The same course of procedure was adopted in each State. This indenture recited that the payment of the bonds outstanding and secured by the first mortgage was part of the consideration for the purchase and ownership of the property by the railway company. The mortgage of the 15th of October likewise recited the same condition in the following language :

" The sale to be made subject to the first mortgage
" made by the Toledo and Illinois Railroad Company,
" bearing date the 8th day of September, A. D. 1853,

" for $900,000, and subject to the following conditions " in relation to said bonds; that is to say, whereas the " payment of the said bonds and the interest thereon " was and is part of the consideration of the said pur- " chase holding and controlling said railroad by the " party of the first part," &c.

At the time of making the second mortgages above described the Ohio and Indiana companies had under contemplation a consolidation, the consolidation agreement being dated the 7th of October, 1858, although the consolidation was not, in fact, consummated by the execution of that agreement until early in November of that year. In November, 1858, the Ohio and Indiana companies were duly consolidated according to the laws of both States, and formed the Toledo and Wabash Railway Company. The statute of Ohio governing the consolidation of the railway companies in force at that time as well as the paragraph of the agreement of consolidation relating to the assumption by the consolidated company of the liabilities of the constituent companies are set out in Judge LURTON'S opinion (Record, p. 58), and a portion of the agreement set out in statement of facts (Record, p. 12). It appears that, by the provision of the statute of Ohio, the consolidated company assumed all the liabilities of the constituent companies as if they had been contracted by it. By the consolidation agreement it likewise expressly assumed a personal liability for all the outstanding bonds and other liabilities of both constituent companies. In 1862 this consolidated company issued the equipment bonds to the amount of $600,000, payable to bearer, unsecured by any mortgage. They were simply sealed notes of the company, payable on the first of May, 1883, with interest after the first of May, 1863, at the rate of 7 per cent. per annum, payable semi-annually.

In August, 1865, the Toledo and Wabash Railway Company, the consolidated company under the laws of Ohio and Indiana, formed by the consolidation of 1858, entered into an agreement of consolidation with railroad companies of the State of Illinois owning lines of railroad which, when united, formed a continuous line of railway reaching to the Mississippi River. This consolidation agreement of 1865 forms the basis of the Compton decree, which must be considered in this case. This agreement was before this Court for consideration in the case of the Wabash, St. Louis and Pacific Railway Company vs. Ham, 114 U. S., 587. The essential provisions of this agreement, so far as they relate to the Toledo and Wabash Railway Company, are set out in the statement of facts (Record, page 3). After the making of the consolidation of 1865, by which the Toledo, Wabash and Western Railway Company was formed, owning a continuous line of railway from Toledo to the Mississippi River, and existing under the laws of the three States—Ohio, Indiana and Illinois—a consolidated mortgage was executed to Knox & Jesup, Trustees, and bonds thereunder issued to the amount of over two millions of dollars in 1867.

A subsequent mortgage, known as "The Gold-Bond Mortgage," was executed and in 1873, was foreclosed, leaving all prior mortgages untouched, and new companies known as the Wabash Railway Company of Ohio, the Wabash Railway Company of Indiana and the Wabash Railway Company of Illinois formed, which purchased upon foreclosure sale the properties in each of those States, and, by a consolidation, formed the Wabash Railway Company, this consolidation being completed sometime in the year 1877. In 1879, a consolidated mortgage was

executed by the Wabash Railway Company covering all its property from Toledo to the Mississippi River, and bonds under it issued and sold, the trustees of the mortgage being Solon Humphreys and Daniel A. Lindley. After the making of this consolidated mortgage, another consolidation took place with a railway company owning a line of railway from St. Louis to Kansas City, by which the Wabash, St. Louis and Pacific Railway Company was formed, which also executed a consolidated mortgage in June, 1880, to the Central Trust Company and James Cheney, Trustees, and covering all the property from Toledo to Kansas City.

History of Compton Litigation.

In February, 1880, James Compton, the appellant in this case, filed his petition in the Court of Common Pleas of Lucas County, Ohio, setting forth the facts as to the issue of these bonds, and making, as parties defendant to his petition, the Wabash, St. Louis and Pacific Railway Company, The Toledo, Wabash and Western Railway Company, The Wabash Railway Company, and the trustees of the mortgages executed upon the properties in Ohio and Indiana subsequent to the consolidation of 1865. In the petition, Compton alleged the ownership in himself of $150,000 out of the total issue of $600,000 of these bonds. The petition averred the issue of these bonds, and that these bonds became, by virtue of their issue and the contract of consolidation of 1865, a lien upon the property which passed from the Toledo and Wabash Railway Company into the possession of the Toledo, Wabash and Western Railway Company in 1865, and prior to all the mortgages executed subsequent to that

consolidation, and asked the Court to declare such lien and enforce the same. The first paragraph of the prayer of the petition was as follows:

Therefore, the said plaintiff prays that this Court will ascertain and determine the amount due on the said bonds known as "equipment bonds" held and owned by the plaintiff herein; and will adjudge and determine said bonds known as "equipment bonds," and all the moneys due and to become due thereon to be a charge and lien upon all of the property of the said defendant the Wabash, St. Louis and Pacific Railway Company that is situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo and Wabash Railway Company at the time the property and franchises of the company last named were transferred to the Toledo, Wabash and Western Railway Company; and will adjudge that the lien of said bonds on the property last mentioned has priority over all liens of all kinds now existing upon the same, excepting the said mortgage executed by the Toledo and Illinois Railroad Company for the sum of $900,000 and the said mortgage executed by the Toledo and Wabash Railway Company for the sum of $1,000,000, which two mortgages are liens on the part of said property situated in the State of Ohio; and also excepting the said mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company for the sum of $2,500,000, and the said mortgage executed by the Wabash and Western Railroad Company for the sum of $1,500,000, which two last mortgages are liens on the part of said property situated in the State of Indiana.

The Common Pleas Court entered a decree in March, 1882, sustaining this lien, and ordered a sale of the part of the railroad in Ohio, subject to the prior lien of the mortgages of the Farmers' Loan and Trust Company and E. D. Morgan. This case was appealed to the District Court of the proper county, and the District Court, under the practice then obtaining in that State, reserved the cause upon an agreed statement of facts to the Supreme Court of Ohio for decision. In 1888, after

argument and several re-arguments in the Supreme Court of Ohio, the case was finally decided by that Court. It affirmed the rulings of the Common Pleas Court, and ordered a decree finding a lien in favor of the equipment bonds upon the line of railroad formerly belonging to The Toledo and Wabash Railway Company, which passed to The Toledo, Wabash and Western Railway Company, and which was described as the line of railroad from Toledo to the west line of Indiana; and also found the amount due upon bonds owned by the plaintiff Compton (the principal of which had matured pending the litigation) and directed that, in default of payment of the amount found thus due, that an order of sale should issue for sale as upon execution at law of all said railroad and real property which is situated in the State of Ohio, subject, however, but subject only to the lien of the two mortgages to the Farmers' Loan and Trust Company and to Edwin D. Morgan, and, after the payment of costs of the action, the balance of the proceeds of sale be brought into court to abide its further order in the cause. The decree further provided that, before offering the property for sale, it should be appraised by three disinterested freeholders, and such appraisal should be of the value of the property, subject to the lien of the two mortgages. The 5th and 6th paragraphs of this decree are set forth upon pages 14 and 15 of the Record in this cause. Under this decree an order of sale was issued in 1888, and an appraisal was had by three disinterested freeholders, but no further steps to bring the property to a sale were taken by Compton. This was prior to the steps to make him a party to the proceedings in the Federal Courts, as hereinafter set forth.

History of Wabash Foreclosure.

While the Compton case was thus pending in the State Courts of Ohio, in May, 1884, the United States Circuit Courts for the District of Missouri, the District of Illinois, the District of Indiana and the Northern District of Ohio, upon the application of the Wabsah, St. Louis and Pacific Railway Co., appointed receivers of all the property of the Wabash, St. Louis and Pacific Railway Co., which receivers duly qualified and took possession of all this property. These Receivers, or other Receivers appointed by the same Courts to succeed them retained possession of the same, until discharged in 1890 as hereinafter stated.

In 1886 decrees of foreclosure of the mortgage given in 1880 to the Central Trust Company and James Cheney, Trustees, were entered in the Circuit Courts for Missouri, Illinois, Indiana and Ohio, and sales made thereunder, but the purchasers at that sale were given possession only of so much of the railway property as lay within the State of Missouri. Certain bondholders under prior mortgages intervened in the cause in the Circuit Court in Illinois, in Indiana and Ohio, and asked to have the Receivers appointed in the original proceedings removed. This request was granted, and a new Receiver of the properties east of the Mississippi River appointed upon their application. In 1887, Knox and Jesup, trustees under the first consolidated mortgage executed in 1867, filed a bill in the Circuit Courts of Ohio, Indiana and Illinois to foreclose their mortgage.

In June, 1888, the trustees of the various divisional first mortgages in Ohio, Indiana and Illinois, filed bills

in the United States Circuit Courts, for their respective Circuits, for the purpose of foreclosing the divisional mortgages, makingas parties thereto the trustees of the subsequent mortgages upon the several mortgage divisions.

In October, 1888, after the filing of these bills by the divisional mortgage trustees, it was found that serious disputes existed between the divisional mortgagees and consolidated mortgage trustees respecting the priority of liens upon the vast body of the equipment, which was used indiscriminately upon all parts of the system of railways. This equipment had been acquired at various times and by different corporations. The several divisions, prior to being merged by consolidation into other companies, had owned equipment. None of the equipment had any assignment to any mortgage division as such. If the divisional mortgages had any priority of lien upon this equipment, or upon certain proportionate parts of it, some method had to be devised to set apart such portion as belonged to each mortgage.

The only mode of settling disputes of this character, as well as similar disputes relating to the priority of liens upon terminals, was to bring all parties claiming interest in any of these properties together in one litigation. Application was therefore made, for the consolidation of all the foreclosure suits into one general litigation, and with the consent of all the mortgage trustees, the suits were all consolidated in each of the circuits, so that after the orders of consolidation were entered in the Circuits Courts in Ohio, Indiana and Illinois, every mortgage trustee of every divisional and consolidated mortgage covering any portion of the property between Toledo and the Mississippi River was represented as a party in

the consolidated cause in each of those circuits. Thereafter the foreclosure suits in the three States proceeded uniformly, the same orders being entered in each circuit, the same testimony taken, the same reference to Masters, and the same decree of foreclosure entered in March, 1889.

These decrees of foreclosure thus entered in each of the circuits of Ohio, Indiana and Illinois foreclosed all the divisional and consolidated mortgages upon all the property between Toledo, Ohio, and the Mississippi River, found the amount due upon each of these mortgages, and required the payment within a certain time, or that the Wabash, St. Louis and Pacific Railway Company or the Purchasing Committee which had acquired the equity of redemption under the foreclosure of 1886, should be perpetually barred and foreclosed. The decree further provided that each division of the road covered by and underlying a divisional mortgage should be offered separately and separate bids obtained on such separate divisions, and then the whole road east of the Mississippi River should be offered as a unit. If the sum offered for the whole road exceed the total bids for the separate divisions the road was to be struck off to the party making the unit bid, and the unit bid was to be distributed to the several divisions in proportion to the amounts bid for such separate divisions. There was a limit upon the amount which might be received on the Ohio Division, the same being the sum due on the first and second mortgages, being the two Ohio divisional mortgages, and upon the Indiana division the limit was fixed at the amount due on the first divisional mortgage.

The sale under these decrees took place at Chicago

on the 15th of May, 1889, and the Purchasing Committee which had purchased under the previous foreclosure proceedings became the purchasers of the road upon a unit bid for the entire line, which bid exceeded the sum of the separate bids by a few thousand dollars. The separate bid on the Ohio property amounted to substantially the first and second mortgages, with no abatement for costs of the foreclosures distributable to that division or receivers' debts, and other preferential claims. The separate bid on the Indiana division was likewise but a little more than sufficient to pay the first mortgage upon that division, with no abatement for costs chargeable to that particular division or receivers' debts, or other preferential claims. The Purchasing Committee subsequently organized a new company, called "The Wabash Railroad Company," to which, about the first of August, 1889, they conveyed the entire line of railway thus purchased by them.

History of this Litigation.

While these consolidated causes were thus proceeding application was made in the Ohio and Indiana circuits in December, 1888, to have James Compton made a party to the foreclosures in those circuits under the Act of 1875 by substituted service. Orders for such service were made by the Judges holding court in the respective circuits, and Compton was made a party in each circuit, appeared, and on the 28th of March, 1889, asked affirmative relief by answers which he filed in each circuit. The nature of the affirmative relief asked for by him is set forth in Judge LURTON's opinion

in this case (Record, p. 53). These answers were not filed by him at the time of the entry of the foreclosure decree on the 23d of March, 1889, but were filed subsequently.

The Circuit Court Judges, JACKSON and GRESHAM, sitting together at Chicago, ordered a decree which was entered on the 23d of March, 1889, but reserved to Compton certain rights, as set forth in the reservation which appears in the record (pp. 8–10). Subsequent to the foreclosure decree, the matter of Compton's claim was referred to a Master in each of the Circuits of Ohio and Indiana. By consent all the proceedings before the Master were taken under both orders of reference. The Master found in favor of the validity of his lien, filed a report in each circuit, exceptions were filed in each circuit to the report, and after hearing upon the exceptions decrees were entered by the Circuit Courts of Ohio and Indiana of the same form, and an appeal was thereupon perfected from the Ohio decree alone. These decrees gave Compton the right to redeem the property upon which the lien existed (to wit, the property which passed from the Toledo and Wabash Railway Company in 1865 into the possession of the Toledo, Wabash and Western Railway Company) from the four mortgages thereon, to wit, two in Ohio and two in Indiana, and in default of such payment that he should be taxed with the costs of all matters in connection with his intervention. The amount which he was required to deposit for the purposes of redemption was the total sum due upon the four mortgages, together with the interest and the taxes which had been paid by the Wabash Railroad Company, but with no deduction on account of net earnings.

The questions presented upon this record, as stated by the Circuit Court of Appeals for this Court's consideration, are:

FIRST. Had Compton the right, under the saving clause of the decree of sale, to a decree for the redemption of the Ohio division only?

SECOND. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?

THIRD. Is the decree of the Circuit Court of the United States for the District of Indiana between the same parties and unappealed from, *res adjudicata* upon the foregoing questions in this Court? (Record, p. 16.)

ARGUMENT.

IN GRANTING COMPTON THE RIGHT TO REDEEM FROM THE FOUR PRIOR MORTGAGES IN OHIO AND INDIANA, THE CIRCUIT COURT GAVE HIM ALL THE RELIEF TO WHICH HE WAS ENTITLED.

The questions of law arising under this proposition are very fully discussed in the respective opinions of Judges TAFT and LURTON, which are certified to this Court. There are, however, what seems to us, aside from the legal propositions, such misconceptions of the

real facts relating to this matter in the opinion of Judge TAFT, that we deem it proper to call specific attention to them.

The first is to be found in the discussion in Judge TAFT's opinion on page 34, in which he denies the applicability of the principle of the case of the *Lawrence Mfg. Co. vs. Janesville Mills*, 138 U. S., 561, and other cases cited by Judge LURTON to the same effect in the latter's opinion, to the case at bar, for the reason that Compton in this case is not like the plaintiff in that case, voluntarily seeking the aid of the Court for a decree, but is involuntarily brought into the Court against his will and compelled to set up his lien, and work out his rights in this jurisdiction upon penalty of losing them.

Judge LURTON in his opinion (p. 53) more truly states what was really Compton's relation to this case by a partial recital of the objects sought by Compton in his answer after he had ineffectually tried to have himself dismissed from the Court. A copy of the 18th paragraph of the answer of Compton to the supplemental and amended bill, and also to the cross-bill of the Farmers' Loan and Trust Company will indicate much more clearly the extent of the relief which Compton was asking at the hands of the Court. After stating the proceedings by virtue of which a decree was entered in his favor in the Supreme Court of Ohio, in the 13th paragraph of the answer he avers that the Toledo and Wabash Railway Co. was the owner of a large amount of rolling stock and equipment which was in no way subject to either of the prior mortgages, and was of the value of about three millions of dollars. In the fourteenth paragraph he averred that it would be necessary to determine the value of said roll-

ing stock now in use, what proportion the rolling stock covered by the liens of the two mortgages prior to the lien of defendant bore to the whole, and what proportion the lien of the defendant covered to that of the whole. In the fifteenth paragraph he also averred that there was in existence a large amount of terminal property, shops and yard property in Toledo, and other real property in the State of Ohio upon which the mortgages prior to his lien were not a lien, and that he was the first lienor thereon. He further averred in the sixteenth paragraph that the income and earnings from the property had always been sufficient to keep down the interest upon the prior mortgages upon the property covered by his lien, and that he was entitled to a reduction of the liens by a proper application of these earnings to the interest. The eighteenth paragraph of his answer concludes with this language:

"This defendant avers that the railroad and other "property in the State of Ohio upon which the lien of "this defendant exists, as before stated, ought not in "equity to be sold in connection with or as a part of "any entire or connected system of railroad; that the "liens existing upon the Ohio division of the said rail-"road are entitled to a separate and distinct sale thereof "for the payment of the same, if not paid by the de-"fendants, or any of them; this defendant insists upon "and prays the court that in such order and decree as "may be rendered herein the same will properly and "equitably settle the priority of liens upon all of said "Ohio property as between this defendant and said "two mortgages, the one to the cross-complainant (The "Farmers' Loan and Trust Co.), and the other to said "Edwin D. Morgan, trustee; the amount due said "division for earnings used for any purpose, for inter-"est, operating expenses, repairs, betterments, or other-"wise on any other division or property; the amount "of rolling stock and equipment properly applicable to "the said Ohio division and the value thereof; and in "all cases that the equities of the lien holders on said "Ohio division or property may be determined as be-

" tween themselves and all other parties hereto, and " that said property, if sold under any decree herein, " may be subjected to separate sale to pay the same. " By 'The Ohio Division' is meant that part of said " railroad property situated in the State of Ohio.

" But this defendant expressly reserves the right to " enforce his said decree in said State court by the " usual process of sale upon execution as directed by " said decree, and does not in any manner waive any " right which said decree gives him " (Court of Appeals Record, p. 179).

From this it will be seen that he was not as Judge TAFT defines him an unwilling and passive party in the Federal Court but was as Judge LURTON defines him at page 54 of the Record, when he says :

" From the filing of that pleading down to the final " decree from which he has appealed he was in the " attitude of one seeking relief by a sale, or by re- " demption if that was inadmissible. After the fore- " closure decree his status was more than ever that of " one applying to a court of equity for relief upon the " footing of a former decree which, by circumstances " subsequently ensuing, could not be advantageously " enforced without further aid."

Compton's pleading in the State of Indiana raised precisely the same questions as his answers filed in the case in Ohio. As in the Ohio answers, he attacked the validity of the liens of the prior mortgages upon the rolling stock and terminal properties, and claimed himself to be a prior lienor thereon, and made the same prayer for an ascertainment and definition of the priority of liens and the equities as between his lien and that of the prior liens and all other parties to the litigation. It is to be observed that none of these issues which he thus presented for the consideration and determination of each of these Courts were settled or adjudicated by the Ohio decree upon which he relied. That decree simply adjudicated that upon the consummation

of the consolidation of 1865 the equipment bonds, and among them the bonds belonging to the plaintiff, became an equitable lien upon all the railroad and real property which were owned by the Toledo and Wabash Railway Company at the time of said consolidation, and which, through said consolidation, passed to and vested in the said Toledo, Wabash and Western Railway Company,

being all of the railroad and property connected therewith commencing in the City of Toledo, in the State of Ohio, and extending therefrom through the Counties of Lucas, Henry, Fulton, Defiance and Paulding in said State, and through the Counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren, in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county ; that the said lien of said bonds is prior and superior to the rights, interest, estates, claims and liens of the defendants in this action, and each of them in and upon said railroad and property upon which said lien is hereby declared, etc.

As Judge LURTON observes, Compton was asking affirmative relief at the hands of the Court not only as against the defendants to his case, but also as against the prior mortgagees. He was asking to have his lien declared prior to the liens of the mortgagees, which the Ohio decree (although these mortgagees were not parties thereto) declared to be superior to his lien. Within the principle of the case of Lawrence Manufacturing Co. vs. Janesville Mills and other cases cited by Judge LURTON (Record, p. 50), he was therefore seeking to have his decree "pieced out," and made effective for the purposes of execution as against all the other parties to the litigation then before the Court. Under these conditions, whatever may have been his original attitude respecting the jurisdiction of

the Circuit Court over him, he had certainly taken his place in that Court as an active litigant seeking to get from that Court all the benefits which could accrue to him by the exercise of that Court's jurisdiction. It was therefore the duty of that Court to consider the equities of the situation as between him and all the other parties to the litigation, irrespective of the provisions of the Ohio decree.

Indeed, in the opinion of Judge TAFT, there is a clear recognition of this precise situation, for, the moment he comes to consider the kind of relief to which Compton is entitled, the position which he takes respecting this relief is a contradiction of his previous position respecting the conclusiveness of the Ohio decree. Notwithstanding the Ohio decree, in terms, in the sixth paragraph provides for an order of sale as upon execution, and provides the method in which that order of sale shall be carried out ; and notwithstanding, in the opinion of Judge TAFT, that provision of the decree is *res judicata* as to the defendants thereto, yet Judge TAFT (Record, pp. 38, 39) proceeds to consider the relief to which Compton is entitled upon equitable considerations wholly outside of the decree, and in view of these considerations to deny Compton the remedy by resale which the Ohio decree gives him.

At page 38 he says :

" But it is said that under the present circumstances a sale subject to the divisional mortgages is impossible, and that any relief which is granted must include a disposition of Compton's rights with reference to those mortgages. This may be true, but it does not destroy the force and effect of the judicial determination that, so far as the parties to the Ohio decree were concerned, Compton has the right to enforce his remedy by sale, or redemption against the Ohio division. The decree of sale of the Ohio division subject to the divisional

mortgagees necessarily carried with it, so far at least as the parties to the suit were concerned, the right on Compton's part or on the part of the purchaser at such a sale to redeem the divisional mortgages. They, in any event, cannot be heard to urge that Compton should be compelled in the enforcement of his lien, either by sale or redemption, to resort to the entire line.

"It remains to consider, therefore, whether a resale can be decreed as against the Ohio Division mortgagees. They were not parties to the Ohio decree, and are, therefore, not bound by it. * * * We think that the peculiar circumstances of this case require that we shall not order a resale. * * * It is true that Compton's decree in the Ohio Supreme Court estops the parties to it from objecting to the relief which that decree gives him, on the ground that he should have brought his suit as a class suit and joined all his co-lienors, but the Ohio divisional mortgagees were not parties to that decree. They may, therefore, properly be heard to object to a resale of the Ohio Division at their risk, if on equitable grounds, it should not be permitted."

In view of the issues raised by Compton, as against prior mortgagees, that he had a prior lien, the prior mortgagees were entitled to take the position, as we insist, that the decree of the Supreme Court of Ohio was null and void under the ruling of this Court in Hassall against Wilcox, 130 U. S., 493. The case of Simmons vs. Taylor, 38 Fed. Rep., 682, is also an authority to support the contention that these first mortgagees were entitled to come into the Federal court and resist either a resale of the property, or any portion of it, or a redemption of any of it.

In this case there was a foreclosure of a first mortgage upon a line of railway, leaving a lien of the second mortgage, unforeclosed by the decree. Subsequently, the trustees of the second mortgage sought to foreclose the second mortgage and to redeem the property from

the first. The purchaser at the foreclosure sale was a party to the attempt to foreclose the second mortgage and to redeem the first, and it was objected there as here to its opposing any objections to the proceeding that it had no right to question the second mortgage for the reason that the second mortgage conceded the priority of the first. But the Court say (p. 685):

"The present railway company derives its title from the sale had upon the foreclosure of the first mortgage. It not only has a title to the property in question, but the source thereof was in existence when the transaction with Clews & Co. took place. Moreover, this Court has already held that, under the peculiar facts of this case, the present company must be held to have succeeded to the redemption right of the original mortgagor, and is entitled to perfect its title to the property by paying off the amount due upon the income and equipment mortgages. It has a direct interest in the question of the amount due upon the latter mortgage, and, having such interest, it is entitled to be present and to be heard upon all objections that can be fairly made to the validity of the bonds sought to be recovered upon under the provisions of the income mortgage.

"But, aside from these considerations, there is another and sufficient ground upon which the Court may hear and determine the question of the validity or invalidity of the bonds sought to be recovered upon in this proceeding. The holders thereof are invoking the aid of a court of equity to grant them relief. On the ground that the holders of the bonds are *bona fide* creditors of the Burlington, Cedar Rapids and Minnesota Railroad Company, and that there is justly due them certain sums evidenced by the bonds held by them, the Court is asked to grant a decree compelling the present company to come to an accounting, and either to pay what is due upon the second mortgage, or to submit to a redemption of the property; the effect of which will be a tearing up of the present system and a separation of the main line and the branches thereof, to the manifest detriment of many parties whose interests were created in the belief that the ownership of the present company was absolute. *To successfully invoke the aid of the Court after*

the lapse of so many years, and when so many other interests have become attached to the property, the parties seeking the equitable aid of the Court must have substantial merit in their cause and must come before the Court with clean hands. The complainants in the present cross-bills are asserting their right to redeem the property, notwithstanding the sale had, under foreclosure of the prior mortgages, on the ground that the income mortgage was, when such sale took place, a second lien on the property, and that the decree did not cut off the lien then existing and the consequent right of redemption. If, as has been already held in the interlocutory decree, the right of redemption still exists, it is the right that was in existence when the decree foreclosing the prior mortgages was entered. Whatever bonds were then valid claims under the income and equipment mortgage had reserved to them the right of redemption; that is to say, being then claims enforceable under the income mortgage, the lien of that mortgage protected them. That mortgage, however, was a lien only to the amount of the bonds then valid and enforceable thereunder; and when the present company took the title of the property under the foreclosure sale it was subject to a right of redemption in favor only of such bonds as were then, through the income mortgage, liens upon the property. For these reasons it must be held that the question of the validity of the bonds sought to be proved up as existing liens under the income mortgage is open to investigation in this proceeding.

Upon appeal to this Court it was held that the income and equipment mortgagees had lost all right to redeem by laches, and this Court directed their bill to redeem to be dismissed.

Simmons vs. B. & C. Ry. Co., 159 U. S., 278.

As to the prior mortgagees in Ohio and Indiana, whose rights were all merged in The Wabash Railroad Company, the Compton decree was null and void. As against Compton, they could attack his rights to redeem at all and invoke the rule announced by this

Court in Wabash, St. Louis and Pacific Railway Company vs. Ham, 114 United States, 587, that Compton as the holder of equipment bonds had no lien upon this property.

In addition to all of the foregoing considerations, the appellees insist that it was the duty of the court of equity to examine the grounds upon which the original Compton decree was based, to ascertain whether it was equitable or not to enforce the same according to its terms.

It must be remembered he was asking the Court not simply to enforce his decree as it stood, but upon that decree as a basis to make a new decree in his favor. Upon such an application the Court should consider whether it was equitable to grant him the relief asked for, and in so doing it was its duty to re-examine the grounds upon which the original decree was rendered. This doctrine is clearly stated in the case of Lawrence Mfg. Co. vs. Janesville Mills, 138 U. S., 564.

"But where a party returns to a Court of Chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being the effect in one of the two aspects, and perhaps the sole aspect in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a Court of Equity to have the benefit of the former decree, the Court was at liberty to inquire whether circumstances justified the relief (Mitf., Ch. Pl., 96). Indeed, it would have seemed to have devolved upon it to show that the decree was a right decree. Such is the language of Lord REDESDALE in *Hamilton vs. Houghton*, 2 Bligh, 193, and of Lord SUGDEN in *O'Connell vs. McNamara*, Dr. and War., 411, 412. The same principle was announced as early as 1700 by the Lord

Keeper in *Johnson vs. Northey*, Finch's Precedents in Chancery, 134. See, also, Lawrence vs. Berney, 2 Rep. in Ch., 127; Adams, 416; 2 Dan. Ch. Pr. (4th ed.), 1586. This rule was much considered and applied in *Wadhans vs. Gay*, 73 Illinois, 415, and approved by this Court in *Gay vs. Parpart*, 105 U. S., 679."

Indiana Mortgagees Parties to Foreclosure Suit in Ohio.

Another misconception appears in Judge TAFT'S opinion in the discussion of the case at pages 44 and 45, in which he reaches the conclusion that the Indiana mortgagees were not parties to the suit to foreclose in the United States Circuit Court for the Northern District of Ohio—a palpable error which a careful investigation of the record in the Court of Appeals would have prevented him from making.

A short statement of the proceedings will very clearly show not only that the Indiana mortgagees were parties to the Ohio suit, but that they were not only proper but necessary parties, in view of the peculiar conditions under which this foreclosure took place. The history of the corporations and of the litigation given in the statement of facts will enable the Court to appreciate this fully when the matter is but stated.

The Wabash, St. Louis and Pacific Railway property was composed of divisions: the Ohio Division, the Indiana Division, the Great Western of 1859 and the Illinois and Southern Iowa and others, reaching to the Mississippi River, upon all of which, prior to their entering into any consolidations, were divisional mortgages, and upon the Ohio, the Indiana, and the Great Western Divisions were second divisional mortgages. While those roads were operated separately as

independent companies they had acquired more or less equipment. After the consolidation of these companies in 1865, as is averred by Compton in his answers, this equipment was commingled by the consolidated company and thereafter used in common. From time to time, as the record shows, in 1867, in 1879 and in 1880, new consolidated mortgages were issued covering the entire property. In connection with the reorganizations, and at other times during these periods of alternate prosperity and adversity, the various companies acquired large additional amounts of rolling stock.

At the time of the proposed foreclosure in 1889 the value of this body of rolling stock between the Mississippi River and Toledo, used upon these railroads was variously estimated at from four to six millions of dollars. None of it was assigned to the mortgage divisions covered by these first mortgages. Each mortgagee, divisional and consolidated, claimed his or its mortgage covered a portion of this rolling stock as a prior lien. In order to distribute to the various divisions the portion of this rolling stock to which they were entitled respectively, or to do what Compton in his answer said was necessary to be done, ascertain with respect to the whole the proportion to which Compton's lien attached as a prior lien, or the proportion to which the prior mortgages on the Ohio division attached as a prior lien, it was necessary that all the claimants to all this equipment should be present and be heard.

This necessitated in any jurisdiction which attempted to define that any party to the litigation had a right or did not have a right to any of this equipment that all these parties should be present; and, therefore, it was that Judges JACKSON and

GRESHAM, the question being presented to them, with the consent of all the mortgagees of all these various divisions and consolidated mortgages, consolidated the causes for foreclosure in Illinois, Indiana and Ohio and in each of those jurisdictions had present as parties every person claiming an interest as a mortgagee on any division of the Wabash property. An examination of the amended and supplemental bill filed in the Circuit Court for the Northern District of Ohio will show, as Judge LURTON very clearly points out (Record, p. 70), that there was described in the bill all the mortgages upon the several divisions as well as all the consolidated mortgages subsequent to the mortgage of Knox & Jesup. The cross bill of Humphreys and Lindley, filed in all the Circuit Courts, likewise described all the mortgages, and made the Trustees all parties, and, in addition thereto, specifically prayed for a unit sale of the property subject to the consolidated mortgage of 1879 (Appeal Record, pp. 91 to 100).

The stipulation, which is found in the Court of Appeals Record (p. 40), shows that all the new parties made necessary by the consolidation, in order to bring in all the mortgagees, who were not already parties to the litigation in Ohio, entered their appearance and appeared to the amended and supplemental bill of complaint, and also to the cross-bill of Humphrey and Lindley and filed their several answers to said bill and cross-bill. Among those who thus appeared and consented to the order as to their answers standing as cross-bills are the solicitors for the Farmers' Loan and Trust Company, trustee under the Ohio and Indiana mortgages, and the solicitors for James F. Joy, the trustee of

the second mortgages in Ohio and Indiana. It is to be observed with respect to this appearance of these parties that they are among the new parties who are described in the same stipulation as having being made "additional parties defendant" to the supplemental bill of complaint. The Farmers' Loan and Trust Co. and James F. Joy, as trustees under the Indiana mortgage, were not in the Ohio court up to that time in any form or capacity, while the Farmers' Loan and Trust Company and James F. Joy, as trustees of the Ohio mortgages, were in the Ohio court. The first named had filed its bill for foreclosure in June, 1888, making the second a party, and by the consolidation they were brought right into the consolidated cause. It was no mistake, as intimated by Judge Taft (p. 44), that Joy filed in this cause the same answer that he did in the Indiana suit for the Indiana bond holders, but it was in conformity with the stipulation above noted under which such answer could be taken to be a cross-bill.

It is to be noted further that an examination of the proceedings will show that S. Fisher Johnson, Edmund Popper and J. H. Purdy, as a committee representing holders of first mortgage bonds of the Ohio Division and the Indiana Division, asked leave of the Court in each of the Circuits to intervene upon the ground that their interests were not being protected fully by the trustees of these mortgages. They filed an answer in the Ohio court, representing as they did first mortgage bondholders in Indiana as well as Ohio, and claiming and asking protection alike for the bonds issued under both mortgages which they represented.

Were there Separable Equities of Redemption?

Judge TAFT's opinion denying the right of the Indiana bondholders to a participation in the redemption as to the Ohio Division, further preceeds upon the theory (Record, pp. 40, 41) that in the consolidation of 1865 there was a transfer of a separable equity of redemption as to both Ohio and Indiana, and that, therefore, Compton may exercise this separable equity as to the property in each of these States. We do not so understand the effect of the Compton decree, or the action of the Ohio Court. It is to be remembered that while the Toledo and Wabash Railway Company issued the equipment bonds in 1862 it was then a consolidated company, as such owning the line in Ohio and Indiana. Long prior to the issue of the equipment bonds it had by assumption made all the outstanding bonds issued by the Ohio and Indiana companies its own personal obligations to the same extent as though it had itself issued them. These bonds were, therefore, the personal obligations of this consolidated company owning this line of railroad. The effect of the act of consolidation in view of the agreement of consolidation and the statutes of Ohio and Indiana is declared in the Compton opinion to be to create a lien upon the property, which passed from the Toledo and Wabash Railway Company, into the hands of the Toledo, Wabash and Western Railway Company, in favor of the owners of obligations of the Toledo and Wabash Railway Company, and not to affix any lien upon the Toledo and Wabash Railway Company itself. This is quite clear from the language of the opinion in *Compton vs.*

Railway Co., 45 Ohio St. At page 618, MINSHALL, J., says:

"It thus appears to be a principle of universal law that the death, real or supposed, of an individual possessed of property, and owing debts, gives to his creditors a right to have his property applied to the satisfaction of their claims. It is a misapprehension of the doctrine to say that its application to the consolidation of railways would make every consolidation an assignment for the benefit of creditors. A new company does not take the property as the assignee, but in its own right, subject only to the payment of the debts of the constituent companies. This liability is created by statute, and the lien results as a consequence. It is not a *jus in re* nor a *jus ad rem*, but a charge in the nature of an equitable lien upon property available against all purchasers with notice."

Again, on page 620, he says:

"This view is much strengthened by the further provision as to the rights of creditors that 'the respective 'corporations shall be deemed to be in existence to pre-'serve the same.' How, for this purpose, shall they be deemed to be in existence, as legal entities, with or without property. Manifestly, in the former sense, for the existence of a corporate entity without property wherewith to answer claims against it would be of no avail to a creditor; a judgment against it would be without fruit. The clause was inserted in the interest of creditors, and the only interpretation which can be of any avail to them cannot be rejected without doing violence to all settled rules of construction. The statute introduced a fiction much as the prætor did in favor of creditors of an *adrogatus*, and we see no reason why it was not intended to answer substantially the same purpose in a suit by a creditor. A company though in fact dissolved is to be deemed in existence, and a judgment in his favor, whether against it or the new company, is to be satisfied from the property owned by the old company at the time of consolidation, as if such proceedings had never been had. The fact of consolidation is pushed aside, and no one will be permitted to question the fiction until his rights have been satisfied. Of this no one as creditor of the new company can in justice complain. The

lien is a result of the proceeding under which the new company acquired its title to the property, and of it creditors of the new company have in law the same notice they have of prior mortgages upon the same property."

Again, in considering the other ground upon which the lien was sustained—viz., the effect of the agreement of consolidation—at page 621 he says:

"The plaintiff does not, however, base his claim to relief solely upon the provisions of the statute, but likewise upon the effect of the stipulation in the agreement forming the basis upon which the consolidation was had, that the class of bonds owned by him should be protected both as to interest and principal as the same should mature by the new company. The principle upon which this claim is based is that, where property is transferred upon the condition that the grantee shall pay some third person a debt or sum of money, the latter acquires an equitable lien upon the property to the extent of the debt or sum of money to be paid him. * * *

"It is true that most of the instances in which this lien has been recognized is where property had been devised charged with the payment of debts or legacies to others, and for the plain reason that the most frequent occasions for its application arise under such circumstances and not because the principle is in its nature inapplicable to other transfers of property. For, as is said by RANNEY, J., in Clyde vs. Simpson, *supra*, 'a doctrine resting upon the broad foundations 'of justice and conscience can not be made 'to depend upon the manner in which the title 'is derived." No such limitation has been placed upon the doctrine by the courts or text-writers (Story's Equity Jurisprudence, 1246). In Vanmeter v. Vanmeter, *supra*, it appears that a grantor had made a conveyance of all his real estate in consideration of one dollar, and the agreement of the grantees to pay his debts and certain legacies; this was held by the court to constitute a lien upon the property in favor of the creditors. Many similar instances will be found among the cases cited; independent of the provisions of the provisions of the statute, we are unable to see why the principle, when applied to the facts of this case, does

not create a similar lien in favor of the holders of these equipment bonds. It would seem to follow as a corollary from what has been said as to liens based upon the provision of the statute, whatever may be urged against the claim, that the agreement to protect these bonds imposed the duty of securing them by mortgage or otherwise. The least that can be claimed for such agreement is that it imposed the duty of paying them, interest and principal, at maturity, and, as all the property of the company issuing them was transferred upon the basis of this agreement, the transfer was to lean upon the stipulation to pay his claim as part of the consideration thereof. If for the purpose of withdrawing from the cares of business or any other reason a private person were to make a conveyance of all his property to another upon the agreement of the latter to pay his debts, it will not be questioned but that such transfer *would create an equitable lien upon the property in favor of creditors* that would avail against all persons with notice. This case is every way analogous to such a transfer, and no reason exists why it should not be governed by the same principle, so far as the rights of creditors are concerned."

We insist, therefore, that Judge TAFT is inexact in his description of the effect of the Ohio decree (Record, p. 40) when he says:

"The Ohio decree established that, as against that company Compton had obtained an interest in the equity from the Toledo and Wabash Railway Company, one of its predecessors in title, and the immediate grantee of the mortgagor Ohio companies."

The distinction which Judge LURTON makes in the following language (Record, p. 62):

"The lien did not exist before the consolidation, but arose as a result of the act of transferring the property; to say that a lien which originated only as a result of the passage of the title is a lien against the company whose act transferred it to another would be as inexact as to say that a vendor's lien rests upon the property of the vendor, when, in fact, it originates as a result of the passage of the title and must be a lien upon the estate of the vendee,"

is founded upon a precise understanding of the basis of the Ohio decision declaring the equipment bonds to be a lien against the property of the Toledo, Wabash and Western Railway Company, which formerly belonged to the Toledo and Wabash Railway Company. And, as clearly pointed out by him if it be true that the lien arose as the result of the act of consolidation it could not be true that any lien existed on any rights which existed in the Toledo and Wabash Railway Company to redeem from the mortgages upon the Ohio and Indiana divisions, respectively, because, when you turn to the agreement of consolidation referred to, there was a unit agreement on the part of the Toledo, Wabash and Western Railway Company to protect the equipment bonds, and to receive the property in Ohio and Indiana, not as separate parcels each charged with the lien of these equipment bonds, but as a single parcel charged with this lien, and the single promise to pay would require a single redemption.

In Wells vs. Tucker (57 Vt., 223) the rule applicable to such redemptions is thus expressed :

> " When one purchases land encumbered with two
> " mortgages, each on an undivided half, and assumes to
> " pay both as a part of purchase money, he cannot re-
> " deem one without redeeming the other. By force of
> " the purchaser's agreement the two mortgages are
> " consolidated into one, the burden of each resting on
> " the whole, and both must be redeemed, not because
> " the lien of each was actually extended over the whole
> " land, but because of the contract itself, which equity
> " takes cognizance of."

As Judge LURTON properly remarks, the Toledo, Wabash and Western Railway Company, having undertaken, in a single promise, to pay the debts of the

Toledo and Wabash Railway Company, did not acquire separable equities of redemption, but had the right only to redeem the entire property as a unit.

The same consolidation or unification of these obligations would seem clearly to result from the operation of the Ohio statute respecting consolidations which is construed and given effect to by the Ohio court in the Compton case. The statute in question, now Section 3380, reads as follows:

> A company organized in this State, and whose line of road is made or is in process of construction to the boundary line of the State, or to any point either in or out of the State, may consolidate its capital stock of any company in an adjoining State, the line of whose road has been or is in process of construction to the same point, when the several roads so united will form a continuous line for the passage of cars; and roads running to the bank of a river which is not bridged shall be held to be continuous under this section.

Section 3381 provides for the method of entering into the agreement and submitting the same to the stockholders. Then Section 3382, which was the original Act of 1856, provides:

> When the agreement is made and perfected as provided in the preceding section, and the same or a copy thereof filed with the Secretary of State, the several companies parties thereto shall be deemed and taken to be *one company* possessing within this State all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of a railroad company.

Section 3383 provides for the method of election of the first Board of Directors, and Section 3384, which is also the original statute of 1856, provides:

> Upon the election of the first Board of Directors of the company created by the agreement of consolidation, all and singular the rights, privileges and fran-

chises of each of the companies to the agreement, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company without further act or deed; all property, rights of way and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate either by deed, gift, grant or by appropriations under the laws of this State, shall not be deemed to revert or be impaired by reason of the consolidation; but all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to the new company and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it.

Consolidation of Ohio and Indiana Indebtedness.

The authorities cited by Judge LURTON clearly establish the proposition that the Toledo and Wabash Railway Company, as between it and the Toledo, Wabash and Western Railway Company, after the act of consolidation, became a mere surety to the Toledo, Wabash and Western Railway Company, and as such was in a position to object to the Toledo, Wabash and Western Railway Company redeeming the Ohio end of the road separate from the Indiana end, and leaving, as in the case at bar, a deficiency to be made good by the Toledo and Wabash Railway Company. This suggestion is reinforced when we remember that, by the agreement of consolidation of 1865, and by virtue of the statute above quoted, the obligations of the Toledo and Wabash Rail-

way Company upon the first and second mortgage bonds in both Ohio and Indiana were united; no distinction was made in that agreement between the obligations in Ohio and Indiana. The first mortgage bonds in both States were consolidated and treated as one general obligation; so, likewise, were the second mortgage bonds. The Toledo, Wabash and Western Railway Company as such accepted them as its obligations.

The evident intention, as between the Toledo and Wabash Railway Company and the Toledo, Wabash and Western Railway Company, as evidenced by the agreement of consolidation, was that all these obligations should be treated alike whether they were issued originally by the Ohio or Indiana corporations. The articles of consolidation in giving the indebtedness of the Toledo and Wabash Railway Company described them as "first mortgage bonds, $3,400,000; second mortgage bonds, $2,500,000; convertible equipment bonds, $600,000" (Record, p. 3). The statute of Ohio which is given force and effect by the decision in Compton vs. Railway Company, and likewise the agreement of consolidation which was construed in that action, were equally as effective to create an equitable lien in favor of these first mortgage and second mortgage bonds in the order of their rank, as they were to create a lien in favor of the equipment bonds.

The Wabash Railroad Company which has succeeded to all the interest of the holders of these bonds is entitled to insist, that when Compton comes into a court of equity, as he does in this case, and by his answer asks a first lien upon a portion of the equipment upon terminal properties at Toledo, and asks for a marshaling of the liens upon the property upon which he claims a lien, he must do equity, and recognize

all equitable liens that exist with respect to that property. It is no sufficient answer to this demand to say that in the original foreclosure suit no formal pleading was filed stating in so many words that these holders of prior first and second mortgage bonds were the owners of such an equity, and therefore that equity will not be protected in this suit. Courts of equity look rather to substance than to mere matters of form. Besides, as Judge LURTON observes (Record, p. 73), its assertion now is an assertion of it as soon as it became material to claim the benefit of it.

Conclusiveness of Compton's Ohio Decree.

Judge TAFT further seems to consider that the redemption should be of the Ohio division alone because the decree of the Ohio court so fixed it, and, as he says, that decree is conclusive upon the parties to that decree. It is not conclusive upon the prior bondholders in any sense, and the decision of this Court in Hassal vs. Wilcox (cited *ante*) is very clearly in point to the proposition that it is absolutely void as to the holders of bonds under the prior mortgages. The suggestion is very pertinent, however, why, if this Ohio decree is binding to the extent thus indicated, how can there be any relaxation by the Circuit Court or the Court of Appeals of the provisions of that decree. Judge TAFT unites with Judge LURTON in holding that the provision of that decree requiring a sale of the property is not binding, by reason of equitable considerations; that, inasmuch as Compton had not brought before the Ohio Court all the holders of these bonds, upon his appeal to the equitable consideration of the Circuit Court, the latter Court would not expose this property to sale as

provided by that provision of the decree; yet it is difficult to see why, if that portion of the decree which directs the sale as upon execution of the property in Ohio, is to be regarded as binding, in so far as it indicates the amount of property which is set apart as applicable to the payment of this claim, why the method which is suggested by the Ohio Court for enforcement of the payment of the amount due is not equally conclusive upon the parties, and, if so, why the method prescribed for making the sale does not also equally conclude all the parties to that decree. In other words, how and upon what principle can that portion of the decree be divided, as Judge TAFT permits it to be divided, and one element in it to be treated as *res judicata* and the other element entirely ignored by the Court?

Objections to Severance of Property.

It is insisted, however, that the Court, having already recognized the severance of this property at the State line, Compton has the same right, but there is a clear distinction between the rights which the mortgagees on these properties, as divisional properties, had to have the properties offered separately as originally mortgaged, and the rights which Compton has in this case, who is seeking to assert a lien upon the entire property as a unit. It is true the mortgages in Ohio and the mortgages in Indiana are separate, but Compton has no right growing out of the rights which these senior mortgagees would have to create such a severance of these properties at the State line. Such a proceeding is inequitable because it is declaring that, when a joint mortgage made by two

equal obligors to secure the same debt is enforced by a foreclosure against the two, the Court should allow the creditor to select which of the equal debtors he would compel to pay the whole debt. The authorities are clear that where several parcels of land are charged with the payment of a common dobt, each part will be compelled to ratable contributions for its discharge.

Deering vs. Winchelsea, 1 B. & P., 270.
Cooper vs. Stevens, 1 Johns. Ch., 425.
Campbell vs. Meiser, 4 *Ibid.*, 338.
McDonald vs. Magruder, 3 Peter, 477.
Bonee vs. Maytrice, 3 Woods, 738.
Adams vs. Smith, 50 Vt., 1.

Under this doctrine it is perfectly clear that the Indiana was equally liable with the Ohio division to the payment of the plaintiff's lien.

It is also a principle that, when a common creditor holds in his hands the right to resort to two properties equally bound for the payment of his debt, equity will not permit him so to use his lien as to cast the whole debt upon one portion and practically release the other.

Cooper vs. Stevens, 1 Johns. Ch., 425.
Barnes vs. Rachster, 1 Y. & C., 401.
Atkin vs. Atkin, 16 C. D., 211.
Allen vs. Clark, 17 Pick., 47.

To allow the Ohio Division to be thus sold, even on full tender of the two mortgages due thereon, would be a deliberate abrogation of the doctrine of equitable contribution which a Chancellor should not permit.

Detweiler vs. Hoederbaum, 42 Fed. Rep., 337.

In addition to this, it is to be observed that, while originally the two Ohio mortgages were separate, both

as to the corporate maker, as well as respects the property covered from the Indiana mortgages, the consolidation entirely changed their character. Not only by the articles of merger, of 1858, but by express agreement of the Toledo and Wabash Railway Company to pay the four liens, they became in substance a concrete mortgage debt resting on the whole road in the two States. At present, by virtue of its purchase at the foreclosure sale, The Wabash Railroad Company holds as a single lien the entire four mortgages in the two States. The appellant's lien being, therefore, subject to all these mortgages upon this unit of property, he can only entitle himself to any results out of the property on the principle of a redemption from an unforeclosed senior lien. The rule is universal that the redemption must be total. The creditor cannot be compelled to split his debt or his security. The Wabash Railroad Company, therefore, holding as a single lien the entire mortgages in the two States, is not compelled to release any of the property to the complainants, except upon the tender of the entire amount of the four mortgages.

Powell on Mort., 342.
Meacham vs. Steele, 93 Ill., 135.
Pearce vs. Mimi L. R., 5 Chapp., 227.
Lamb vs. Montague, 112 Mass., 352.

In Maine we have a question very similar to the one under consideration. A railroad lay partly in that State and partly in New Hampshire. An execution creditor with a levy in the former State attempted to redeem from a mortgage on the whole road. It was decided that he was entitled and required to pay the entire mortgage debt in both States.

Wood vs. Goodwin, 49 Maine, 266.

Such a position is likewise entirely opposed to the doctrine of the Courts that a railroad is an entirety and that no such division into parts should take place as against the interests of the public, unless it is imperatively necessary. In the case of The Dayton, Xenia and Belpre Railroad Company and others vs. Lewton, 20 Ohio St., p. 401, we have a case directly in point upon this question. Lewton agreed in writing with the Dayton, Xenia and Belpre Railroad Company to release the right of way and the right to enter upon and construct its railroad through his lands. In consideration of this, the railroad company agreed to pay a certain sum of money at a future day and construct certain railroad crossings and cattle guards upon Lewton's land. The company took possession and constructed its road before receiving any deed for the right of way and before payment of the money and constructing the crossing and cattle guards. Upon this state of facts it was held that Lewton was entitled to an equitable lien upon the property sold for damages for not constructing the railroad in the manner provided in the agreement as well as for unpaid purchase money. It was also held that his remedy was by either compelling specific performance of the contract or by enforcing his specific lien by a sale of the entire road. McIlvane, J., at page 412, says :

" The last question we propose to consider is one of greater difficulty. The Court below decreed the sale of the whole of the Dayton, Xenia and Belpre Railroad (which, at the time, was being used as a public highway) to satisfy the specific lien of the defendant in error upon a section of the right of way. Is such decree erroneous ?

" The rights of the public must not be ignored, and

it is the right of the public that this highway be maintained. It was by and through the exercise of its power of eminent domain that it was established, and we take it that the right of the public to maintain the highway is paramount to the right of the defendant to destroy it. To sell the section of the right of way over the lands of the defendant in error and separate its use from the line of the road would destroy the highway. Hence, to have decreed a sale of this fraction of the road, or right of way, would have been erroneous. The public having delegated to the Dayton, Xenia and Belpre Railroad Company the power to exercise the right of eminent domain in the establishment of its highway, the company had power to obtain the right of way for its road in two modes—by condemnation and prepayment of compensation under the right of eminent domain, or by contract with the owners of land, upon such terms as might be agreed upon. In Lewton's case, the latter mode was resorted to, and, by the terms of the contract, a right to enter upon the land and construct the road before the payment of the compensation was secured; and yet that compensation was secured to Lewton by an equitable lien upon the easement thus obtained by the company. And justice requires that this security shall be applied to the satisfaction of Lewton's claim. Can it be done? The difficulty is apparent rather than real. The public has and can have no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. And this right is as well subserved if the ownership and management of the highway be in the hands of one party as another. Hence, the public has no interest impaired by a sale of the whole line.

See, also,

Woelpper vs. The Philadelphia, Baltimore & Wilmington Railroad, 64 Penn. St., 366.

Dunham vs. The Railway Co., 1 Wall., 254, construing Indiana statute of May 11th, 1852, with reference to mortgaging railroads.

Shaw vs. Bill, 96 U. S., 16.

Stevens vs. Watson, 4 N. Y. Appeals Decision, 202.

Pierce vs. Milwaukee, &c., Railway Co., 24 Wis., 551.

Farmers' Loan & Trust Co. vs. Fisher, 15 Wis., 14.

As between the Ohio and Indiana bondholders there is another feature of this situation to which no effect is given by either Judges TAFT or LURTON, and which would seem to be conclusive as against the contention of COMPTON that he was entitled entirely to separate the Ohio and Indiana properties and treat the indebtedness existing under the first and second mortgages in those States as entirely independent. It is to be remembered that his decree did not in any way define his lien upon any equipment which was used by the Toledo and Wabash Railway Company in Ohio and Indiana as a unit. That such equipment was in existence is evidenced by the answers of Compton filed in this suit and in the Indiana suit, to the amended and supplemental bill in this case, and also to the bill of the Farmers' Loan and Trust Company. In the fourteenth paragraph of his answer to the amended and supplemental bill in this suit, he alleges that it will be necessary to determine what proportion of the rolling stock was covered by the liens of the two mortgages prior to the lien of defendant, and what proportion his lien covers which was not covered by the two prior mortgages; and further, that the value of the rolling stock, equipment and machinery was largely increased by the Toledo and Wabash Railway Company before the consolidation of 1865, and that the portion which would be attributable to the Ohio property should be ascertained and determined before a final decree herein.

Substantially the same suggestion is made in the answer to the Farmers' Loan and Trust Company's bill in the twenty-third paragraph thereof (Appeal Record, pp. 176–199).

If, therefore, it should be held by this Court that the Indiana and Ohio mortgages are not to be treated after the consolidation of 1865 as a practical unit and consolidated, yet in view of these averments it is evident that they were mortgages as to the equipment upon a unit of property which was not separate but commingled and held and used in common by the Toledo and Wabash Railway Company. As such common property clearly the Indiana mortgagees would be entitled to redeem this equipment and hold any equity therein as applicable to their liens as against Compton's lien which was subordinate to their lien and in that capacity would have the right to object to the sale or the redemption separately of the Ohio Division. It must be remembered that the decree of foreclosure and sale of March 23d, 1889, by the nineteenth paragraph thereof, provided that, for the purposes of this decree and of the sale and not otherwise, the rolling stock and equipment which was held in common was regarded as apportioned to each division according to the mileage of the mortgaged divisions. There was, however, a specific reservation in the 36th Section of the decree, that as to the equipment the proceeds of the sale of the divisions and lines should go the lienholders upon such division conditionally and subject to the right of junior lienholders to assert and maintain their claim upon such proceeds of the said equipment as they may be advised. In order that such assertion of the rights of junior lienholders might be successfully made, the valuation of

said equipment was agreed upon according to certain schedules in the testimony which were referred to.

Right to Resale of Ohio Division.

In the brief in this Court (p. 50), the claim is made that a rule of property is established in Ohio by the case of Stewart vs. Johnson (30 Ohio St., 24), and is controlling upon this Court, and that it should, therefore order a resale of the Ohio property. The answer to this suggestion is, first, that Compton is not proceeding to foreclose a mortgage. He is proceeding in equity for relief in equity and the question is, therefore, what decree would afford adequate remedy for him and not be oppressive upon the defendants. This is a question, therefore, which appeals, as we submit, to the sound discretion of the Court. In addition thereto, this Section 5316 has distinct application only to a foreclosure upon real estate, and the question at once arises whether, even if this proceeding be treated as analogous to the foreclosure of a mortgage, and, therefore, within the spirit of the section in that regard, the section is applicable to the sale of a railroad. An examination of the section would seem to show that, in the light of adjudications in the State of Ohio, there is a very broad distinction between the kind of property intended to be embraced within the provisions of Section 5316 and a railroad. The case of Dayton, Xenia and Belpre Railroad and others vs. Lewton (20 Ohio St., 401) enforces a doctrine as to the unity of a railroad line entirely inconsistent with the idea of a sale of land in one or more tracts as is contemplated under the provisions of Section 5316. This doctrine was announced, it is to be observed,

under an express contract for the sale of lands by virtue of which a vendor's lien upon the lands sold was secured to Lewton. If Section 5316 had any application to railway property, it is singular that McIlvaine, J., in passing upon the Lewton case, did not consider that part of Section 5316 relating to a sale in one or more tracts as allowing the specific application of Lewton's vendor's lien to the portion of the railway sold by Lewton.

But we are not without authority in this Court upon this subject, and, so far as we know, wherever the question has been presented it has been held that statutes of the character of this, relating to the sale of real estate, have no application to railroad property, mortgaged or otherwise encumbered by liens. Thus, in Hammock vs. Loan and Trust Company (105 U. S., 77), the Court had under consideration a statute of Illinois similar, in some respects, to the one we are considering. By that statute, real estate taken in execution, if susceptible of division, was required to be sold in such quantities as might be necessary to satisfy the execution and costs, and there was a further provision respecting redemption. It was insisted that, under the sale of a railroad in that case, this statute applied, and that there was a right to redeem under the Illinois statute, and that the sale was not properly had, because not conforming to the provisions of the statute in some respects. Justice Harlan says :

" The question is, therefore, presented for the first
" time in this Court whether the statutory provisions
" giving the right to redeem as well lands or tenements
" sold under execution as mortgaged lands sold under
" decrees of courts of equity, has any application to
" the real estate of a railroad corporation, which, with

" its franchises and personal property, is mortgaged as " an entirety, to secure the payment of money bor- " rowed for railroad purposes.

" Undoubtedly in all such cases the chief value of " the real estate comes from the right or franchise to " hold and use it, in connection with the personal " property of the corporation, for railroad purposes. " It is equally true not only that the bonds to secure " which the mortgage was given could not be nego- " tiated in the markets of the country did not the mort- " gage embrace as an entirety the franchises and all " the real and personal property of the corporation " used for railroad purposes, but that a sale of the real " estate, franchises and personal property, separately, " might in every case prove disastrous to all concerned " and defeat the ends for which the corporation was " created, with authority to establish and maintain a " public highway.

" It is nevertheless contended by counsel that, as the " statute attaches to decretal sales of mortgaged lands " the right of redemption, that right exists as well in " cases of mortgages, covering the entire property and " franchises of a railroad corporation, as where the " land is owned and used by private persons for " exclusively private purposes.

" In other words, for to that result the argument " would lead, the Court in decreeing the sale of the " mortgaged property and franchises of a railroad cor- " poration has no discretion, if the corporation or " judgment creditors so demand, except to order the " sale of the real estate separately, in parcels, when sus- " ceptible of division and subject to redemption, leav- " ing the franchises and personal property to be sold " absolutely and without redemption. Thus, one per- " son might become the purchaser of the real estate, " another of the franchises, and still others of the " personal property. If the railroad company should " redeem the real estate it could not employ it to any " valuable end, for its franchise to be a corporation " and to use its real estate for railroad purposes will " have been sold to another, and there is no right " under the statute to redeem the franchise, it not being " real estate, but rather a power or privilege, partaking " more or less of sovereignty, and which may not be " exercised without a special grant (1 Redfield on Law " of Railways, 94). * * *

"We are of opinion that mortgaged real estate to "which is attached the right of redemption, is such "and such only as could at law be levied upon and "sold on execution. The right does not extend to the "real estate of a public corporation, mortgaged with "its franchise, to acquire, hold and use property for "public purposes, and whose chief value depends upon "its being so used and appropriated. The difference "between real estate so acquired, held and used, and "real estate which may at law be sold under execution, "is well illustrated in Gue vs. Tidewater Canal Co. (24 "How., 257)."

The same result was reached in the carefully considered case of Commonwealth vs. Susquehanna and Delaware River R. R. Co., 122 Penn. St., 306. In this case there was a judicial sale under an act of Pennsylvania of the franchises and property of the corporation made upon a *fieri facias* issued upon the judgment of an individual bondholder for arrears of interest upon bonds secured by trust mortgage. After the sale the purchasers at such sale claimed to have organized a new corporation, and to be entitled by virtue of such organization to enjoy the franchises and rights of the defendant in the writ. Upon *quo warranto* the question was presented as to the application of the statute to a railway. The Court below overruled the demurrer to the answer, and entered judgment for the defendant upon the ground that the railway being real estate came within the provisions of the statute under consideration. The case was taken to the Supreme Court. WILLIAMS, J., says:

"There is room to distinguish broadly between a "mortgage of land in the common form and a mort-"fiage of the franchises and rights of a railroad com-"pany like the one now before us. In the former, the "bond and mortgage are payable to the creditor, "both are under seal, both pass only by assignment, "both are taken as constituting together one security,

" and the creditor may, on default made by his debtor, " resort to either an action on the bond or a *scire facias* " on the mortgage. In either case the debtor has " actual notice of the proceeding in all its stages, and " in either case the land covered by the mortgage must " be sold as land. But in the latter form of mortgage " the conveyance is not to the creditor, actual or pros- " pective, but to a trustee, who takes title to the fran- " chises, etc., for those who may become holders of " the bonds secured thereby. Until default is made in " the payment of the bonds, or the interest falling " due upon them, the trustee has no active duties to " perform, but is simply the repository of the title " to the property mortgaged in trust for the whole " creditor class secured thereby. The actual possession " of the franchise and other property remains in the " railroad company, to enable it to discharge its duties " to the public and earn an income from which to pay " its liabilities. But, when a default occurs, the duties " of the trustee become active and important." * * *

" There is also an equally broad distinction between " the nature of the property mortgaged by a private " person and that mortgaged by a corporation. In the " first case the mortgage is of land as such, which is " subject to lien in the county in which it lies, and " must be sold there, and, whether sold upon *levari* " *facias* on the mortgage or a *venditioni exponas* upon " a judgment entered on the bond, it is wholly imma- " terial to the debtor and to everybody. The same " notice, personally or by publication, must be given " in either case, and the result as to the mortgaged " premises is an extinguishment of the lien of the " mortgage, no matter which method is adopted. But " the corporation, under the authority of an Act of As- " sembly, mortgages its franchises, the gift of the State, " its corporate powers and corporate property. These " are not land, and the mortgage is a lien upon them " only because the making of such a mortgage is ex- " pressly authorized by law."

The case of Stewart vs. Johnson, 30 Ohio St., 24, is based upon Section 374 of the old Code of Civil Procedure, now Section 5316 of the Revised Statutes of Ohio. The authorities from which we have quoted above very clearly show the distinction that is to be

taken between railroad property as such and real estate. This section reads as follows:

"When a mortgage is foreclosed a sale of the premises shall be ordered; and when the premises to be sold are in one or more tracts, the Court may direct the officer who makes the sale to subdivide, appraise and sell the same in parcels, or to sell any one of the tracts as a whole."

Construction of the Reservation of the Decree.

In the appellant's brief in this case, much is made of the construction of the reservation in the foreclosure decree of March 23, 1889, and apparently the attempt is made to have the whole question under the saving clause of this decree reopened for discussion. We do not understand that, upon this reservation, anything is open for discussion, but the question whether the redemption according to Compton should be limited to Ohio or reach to the whole property in both Ohio and Indiana. The decision of the Circuit Court is unanimous upon the construction to be given to this provision of the decree and therefore we do not consider the suggestions, and arguments or rearguments of this question as material in this case.

If the question were to be reopened, we think it is perfectly clear in view of the considerations urged by both Judges TAFT and LURTON that the construction contended for by the appellant is an untenable one, not only upon the grounds suggested in the opinion of those Judges, but also upon the ground that it appears from the very face of the reservation that it was

not intended that the purchaser of a portion of this property should be affected by any order of the Court for resale or redemption which did not equally affect the foreclosure of the other portion of the property. Its provisions are to be construed in the light of the whole decree, which provided for a separate offer at the sale of the Ohio and the Indiana Divisions and must have contemplated the possibility of a separate purchase at such sale when thus offered. It will be noticed that the provision of the reservation is:

"Then the purchaser or purchasers at any sale or "sales had hereunder of that portion of the property "sold covered and affected by said lien or the success- "ors in title of said purchaser or purchasers shall "pay," etc.

It is evident that in using this language the Court contemplated the possibility of there being separate purchasers of these two divisions, and, if there were, then very clearly both would be affected by any order which the Court might make. It, therefore, made the provision that the purchaser, in case one was the purchaser of the entire property or both, if separate persons purchased the separate divisions, should be liable to be affected by such order as the Court might make. Suppose that different persons had purchased the Ohio and Indiana divisions, as was entirely within the contemplation of this decree, and that Compton had applied as he has for the payment of the money due under his decree, and it not being paid had sought to have the Ohio property alone sold, would it not be a distinct violation of the terms of the contract under which the Ohio purchaser took that property, to entirely relieve the Indiana purchaser from any burden of the Compton decree? Or, in case he had sought to have

the Indiana property bear the burden of this lien alone, could not the Indiana purchaser object that it was not the contract which had been made with him? In other words, would not either of these purchasers have the right to insist that the property purchased by him should only bear its legitimate proportion of the burden of the Compton decree?

The construction now put upon this decree by Compton's counsel also seems to us entirely inconsistent with the view entertained by them when they filed their answers, only five days after this decree was entered. If all that was incumbent upon them to secure payment of their decree was to establish its validity and continued binding force, what necessity can be suggested for their reiterated assertions in their answers of their lien having priority as to equipment and terminals in both Ohio and Indiana? In their brief (p. 47) they say: "All parties were willing to pay that price, if necessary, to avoid the delay which would otherwise ensue. They hoped to escape such payment by defeating Compton's lien." This *price* was paid March 23d, 1889, if we are to take their statement of the transaction. On the 28th of March, 1889, they file their answers asserting claims entirely inconsistent with any such understanding of their rights under the saving clause of the decree.

II.

Judges Jackson and Gresham were right in denying the right of Compton to reduce the amount fixed for redemption by an accounting for net profits.

This question turns upon the further question, in what capacity the Wabash Railroad Company is occupying the railroad as between it and Compton. If the Wabash Railroad Company was in possession as mortgagee alone it would undoubtedly be liable to account for the net profits, but it is to be remembered that this foreclosure was a foreclosure of all mortgages prior and subsequent to Compton's, and was likewise a foreclosure of the mortgagor's equity of redemption. The Wabash, St. Louis and Pacific Railway Company, the last of the consolidated companies owning this property, had succeeded to all the equities of redemption of the prior companies, and the foreclosure was, therefore, of this mortgagor's equity of redemption. The language of the decree of foreclosure is very conclusive upon that point.

Thus the decree, after reciting the foreclosure of 1886 in the United States Circuit Courts for the Eastern District of Missouri, Illinois, Indiana and Ohio of the general mortgage of 1880 to the Central Trust Company of New York, and James Cheney, trustees, proceeds to find that on or about the 6th day of January, 1886, decrees were entered in said consolidated action foreclosing the said general mortgage of the Wabash, St. Louis and Pacific Railway Company, and ordering the railway and properties in said decrees described, to be sold subject to

the liens of the mortgages executed prior to the said general mortgage by said Wabash, St. Louis and Pacific Railway Company, or any of its predecessor corporations.

That thereafter, and on or about the 26th day of April, 1886, under and in pursuance of said decree, the property therein directed to be sold was so sold to the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells, acting as a purchasing committee. After reciting that this sale was ratified, and after finding the amounts due on the various mortgages foreclosed, the decree proceeds:

"It is further ordered, adjudged and decreed that, within ten days after the entry of this decree, the mortgagor corporation, or its successors or assigns, or other persons obligated to the payment of the said bonds, or owning the equity of redemption in addition to the amounts heretofore adjudged to be due upon divisional first and second mortgages and the consolidated mortgage, pay or cause to be paid into this court the sums following, that is to say: * * * That in default of such payment, or any part thereof, the equity of redemption of the defendants James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Wells, as such purchasing committee, and of all other defendants in this cause, of, in and to the properties mentioned and described be forever barred and foreclosed; and that all and singular the railway property, equipment and franchises, etc., be sold as hereinafter directed at public auction, without redemption, to the highest bidder or bidders by the Special Master hereinafter appointed."

Judge TAFT puts his conclusion that the Wabash Railroad Company should account for net earnings upon the ground that it is to be regarded as the first Ohio mortgagee in possession, and, therefore, liable to account for the rents and profits or net earnings of the mortgaged property in ascertaining the amount required

to redeem (Record, p. 48). Judge LURTON's view is that the Wabash Railroad Company is not in possession as first mortgagee (Record, p. 74). Judge TAFT gives as a reason for the position taken by him that "when the sale in this case took place the mortgaged property was in the hands of Receivers—that is, the mortgagees were in possession, and the rents and profits were applicable to the mortgages in the order of their priority" (Record, p. 49). By turning to the statement of facts it would seem that Judge TAFT had overlooked the facts which are found in this matter respecting the appointment of the Receivers of this property. The facts are that the Receivers were appointed, not upon the prayer of any of the mortgagees, but in the original proceeding upon the prayer of the company itself. This is very clearly shown in the statement of facts (Record, p. 4), where it appears that, upon the bill filed by the Wabash, St. Louis and Pacific Railway Company, Receivers were appointed who took possession of the railroad and operated it. There was no disturbance of the possession of these Receivers, or their successors, at any time, notwithstanding all the subsequent proceedings for foreclosure of other mortgages. The property west of the Mississippi River was delivered to the purchasing committee after the sale in 1886, but the property east of the Mississippi River, with which we are concerned in this case, remained in the possession of the Receivers who had been appointed upon the bill filed by the corporation itself, the mortgagor, or their successors.

The rule upon the subject as to when a junior mortgagee redeeming from a senior mortgagee may compel

an accounting is thus stated in Jones on Mortgages (5th Ed.), 1118*a* :

" His right to compel such an accounting does not rest upon any obligation of the senior mortgagee to him, for there is no contract between them, but upon the fact that the senior mortgagee is under obligation to account to the mortgagor, and the junior mortgagee in equity stands in the place of the mortgagor. The junior mortgagee has no right, therefore, to compel an accounting when the mortgagor has no such right, for it is through the mortgagor and the equity raised between him and the senior mortgagee that he is enabled to compel an application of the rents and profits to the satisfaction of the senior mortgage. For these reasons it is well settled that, in order to charge the mortgagee with the rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises. A purchaser at a foreclosure sale which is defective by reason that a junior mortgagee was not made a party to the bill, must account for the rents and profits upon subsequent redemption by the latter, if such sale operates merely as an assignment of the mortgage. But if it operates not only as an assignment of the prior mortgage, but as a foreclosure of the equity of redemption subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits."

In Gaskell vs. Viquesney, 122 Indiana, 244, the question was presented upon an application by a junior mortgagee to redeem from the purchaser upon foreclosure of a prior mortgage. In this case the Court below refused to permit the appellant to prove the value of the rents and profits of the mortgaged premises, as it was admitted upon the trial that the title of the mortgagor had been extinguished before the

appellee took possession. The Court states the doctrine substantially in the language above quoted from Jones on Mortgages, and cites as authorities in support of the doctrine Daniel vs. Coker, 70 Ala., 260; Hart vs. Chase, 46 Conn., 207; Van Duyne vs. Shann, 41 N. J. Eq., 312; Catterlin vs. Armstrong, 79 Ind., 514; 101 Ind., 258; Jackson vs. Hosford, 110 Indiana, 579, and Renard vs. Brown, 7 Neb., 449.

In Renard vs. Brown, 7 Neb., there was a case where the senior mortgagee purchased upon a sale in a foreclosure to which the mortgagor was a party. The Court hold in that case, in a carefully considered opinion that the purchaser was not liable to account for the rents and profits inasmuch as he stood in the shoes of the mortgagor, and as such was not liable to account for the use of the property.

III.

The decree of the United States Circuit Court of Indiana is a conclusive adjudication of all the questions sought to be raised in this case.

The history of the litigations in Ohio and Indiana has already been stated sufficiently to show that in the Indiana Circuit Court the same issues were made as in the Ohio Circuit. In Indiana there was presented the question, therefore, whether Compton had a lien upon the property in Ohio and Indiana. He sought in that jurisdiction as in the case before the Court an ad-

judication of the priority of his lien upon the terminal property at Toledo, upon the equipment, and also asked for a determination of the order of liens upon the property upon which it was alleged his decree rested. He set up the decree of the Ohio Court declaring a lien in his favor as to the properties in Ohio and Indiana formerly belonging to the Toledo and Wabash Railway Company, as a conclusive adjudication against all the parties interested in these properties in Ohio and Indiana, who were parties to that litigation. All the parties who had any interest in the railways in Ohio or Indiana were parties to this litigation in the Indiana Circuit Court. The decree entered was in precisely the same form as the decree appealed from in this case. That decree, not having been appealed from, stands as a final adjudication of the issues involved in that suit, and, as we insist, is pleadable everywhere as an estoppel against a further litigation of the same questions.

It is likewise a proper basis of a motion to dismiss or affirm the appeal in this case, for it shows that there has been a conclusive determination of all the questions involved in this case, which renders all the questions raised herein purely moot questions. The Appellate Court should, therefore, proceed no further with this case.

South Spring Hill Gold Min. Co. vs. Amador Medean Gold Min. Co., 145 U. S., 300.

Little vs. Bowers, 134 U. S., 547.

California vs. San Pablo & T. R. Co., 149 U. S., 308.

E. T. V. & G. R. R. Co. vs. Southern Tel. Co., 125 U. S., 695.

Washington Market Co. vs. Dist. of Columbia, 137 U. S., 62.

Singer Mfg. Co. vs. Wright, 141 U. S., 696.
Elwell vs. Fosdick, 134 U. S., 500.

The answer to this suggestion which is made by Judge TAFT is that the sole question in the Indiana case was what remedy Compton could have for the enforcement of his lien against the Indiana property, and not against the Ohio property. That is to say, that the foreclosure suit in Indiana only had or could have relation to the Indiana property, and the inquiry therein as to Compton's lien could only be confined to the Indiana division notwithstanding all the parties were before the Court. We do not understand that any such limitation exists as to foreclosure decrees of this character. It seems to us entirely antagonistic to the doctrine of Muller vs. Dows, 94 U. S., 444, and Union Trust Company of New York vs. Olmsted and others, 102 N. Y., 729. Black on Judgments, Section 872, states the rule as follows:

"There is, however, an indirect way in which in certain cases a decree in a court of equity may affect the title of land lying in another State. A chancery court in one State having acquired jurisdiction over the persons of the parties may enforce a trust or specific performance of a contract in relation to land situated in another State and decree in such cases, but the deed of a master executed in pursuance thereof cannot operate to transfer the title to such lands; yet the decree is binding upon the conscience of the parties and it concludes them in respect to all matters and things properly adjudicated and determined by the Court. And when the decree in such cases finds and determines the equities of the parties in respect to such land and directs a conveyance by the parties in accordance with their equities, such decree, providing no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the Courts of the State where the land is situated, and it is entitled in the Court where so pleaded to the force and effect of a record conveyance of the equities therein determined unless it be impeached for fraud."

In the case of *Burnley vs. Stevenson* (24 Ohio St., 474) we have a holding upon a case very similar to the question presented to this Court upon the motion to dismiss or affirm. In that case the original action was brought in the Court of Common Pleas of Pickaway County, Ohio, to recover from the defendant possession of two undivided third parts of tracts of lands situate in that county. The plaintiff sought to recover in the right of the heirs of one Gen. Charles Scott, to whom the land had been conveyed by patent of the United States in the year 1812. The defendant, by way of defense, set up in answer that, previous to the date of said patent, Scott had employed one John Evans as surveyor, to locate patents for him and had agreed to convey to Evans one-fifth part of all the lands so surveyed and patented; that the lands embraced in the survey in question were a part of the lands located, surveyed and patented to Gen. Scott under a certain warrant; that it was further agreed between Scott and Evans that the share of Evans under the contract should be selected from lands in said survey. Soon after the issuing of the patents to Scott he died without having conveyed to Evans the lands to which he was entitled under this contract; that afterwards Evans filed his bill in chancery in the Circuit Court of Fayette County, Kentucky (the same being a court of general equity jurisdiction), against the heirs and legal representatives of said Scott (being the same persons under whom the plaintiffs claimed title), to compel the specific performance of said contract by a conveyance of the lands to which Evans was entitled thereunder. The Court obtained jurisdiction of the persons of all the heirs by service of process and by appearance. Upon the final hearing of said cause, upon bill, answers and

exhibits, on the 2d of February, 1816, the Court found the equity of the case in favor of Evans, and directed the defendants to convey to him the lands described in the petition of the plaintiffs. It was further decreed by the Court that in default of such conveyance by the defendants, one Robert Scott, a Master Commissioner of said Court, should make such conveyance. Afterwards the Master Commissioner did execute such conveyance. The defendant claimed that he had succeeded to all the rights and title of Evans in the said lands. Judgment was thereupon rendered upon the issue in favor of the defendant and affirmed by the District Court, and the matter thus came into the Supreme Court. The syllabus, which is the announcement of the judgment of the whole Court thereon, states the principle decided very clearly:

1. A court of Equity in one State, having acquired jurisdiction over the persons of the parties, may enforce a trust, or the specific performance of a contract, in relation to land situate in another State.
2. Although the decree in such case, or the deed of a Master executed in pursuance thereof, can not operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and concludes them in respect to all matters and things properly adjudicated and determined by the Court.
3. When the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense in the Courts of the State where the land is situated; and it is entitled in the Court where so pleaded to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud.

McILVAINE, J., thus concludes his opinion in the case :

That this decree had the effect in Kentucky of determining the equities of the parties to the land in this State we have already shown ; hence the Courts of this State must accord to it the same effect. True, the Courts of this State cannot enforce the performance of that decree by compelling the conveyance through its process of attachment ; but, when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein unless it be impeached for fraud (see cases *supra ;* also, *Davis vs. Headley*, 22 N., 115 ; *Brown vs. L. & D. R. R. Co.*, 2 Beaseley Eq. (N.), 191 ; *Dobson vs. Pearce*, 2 Kernan, 156 ; *U. S. Bank vs. Bank of Baltimore*, 7 Gill, 415.

It is to be observed that this conclusion is reached notwithstanding the Court holds in unmistakable terms that the Master's deed executed in pursuance of the decree in Kentucky was to be regarded as a nullity and not effective for the purposeof transferring title to lands situate in a foreign jurisdiction. Justice McILVAINE thus states the conclusion of the Court in that regard :

It does not follow, however, that a Court having power to compel the parties before it to convey lands situated in another State may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such Court cannot operate to transfer title to land situate in a foreign jurisdiction. * * * And, if a decree in such case cannot effect the transfer of title to such lands, it is clear that a deed executed by a Master, under the direction of the Court, can have no greater effect.

In the brief filed in this case we have an abandonment by Compton of the position heretofore contended for by him in his litigation as to the scope and effect of the Ohio decree. Thus, at pages 30, 31, 45, 49 and

64 of the brief, there is the assertion made and repeated that the decree in the Ohio case affected the Ohio property alone. At page 31 it is stated that his Ohio decree was inoperative as to Indiana, and totally ineffective and of no effect without new litigation, and that his lien on the property in Indiana remained, as prior to the Ohio decree, a mere floating equity. This idea is repeated on page 45 and other pages quoted above. It is thus stated at page 64 respecting the Indiana property:

"He was made a party to bar and cut off any lien "he might have on the Indiana property. The only "lien that he had on that property, if he had any, was "an ordinary equitable lien under the consolidation of "1865." Then, further: "The finding in the Compton "decree that the equipment bonds were a lien on the "railroad in Ohio and Indiana did not have any extra-"territorial effect, and did not, therefore, in and of "itself operate to establish a lien on the Indiana prop-"erty."

In the answer filed in the Indiana case he took an entirely different position upon this subject. In setting up the adjudication of the Supreme Court of Ohio he made the following averments:

"This defendant admits that thereafter, to wit, on March 10th, 1882, the said Court of Common Pleas of Lucas County, Ohio, rendered a decree in favor of this defendant in such suit instituted by him, adjudging that the said equipment bonds constituted an equitable lien and charge upon all the said railroad in the States of Ohio and Indiana prior to the lien of the bonds issued under the mortgages of 1867 and 1879 in the said amendment cited."

Further,

"This defendant avers that the said judgment and decree of the Supreme Court of the State of Ohio is incorrectly set fort in the said amendment and that the same was and is, a final decree adjudging the said

equipment bonds to be a lien upon all of the railroad and real property and the structures thereupon and the fixtures and appurtenances thereto appertaining which were owned by said Toledo and Wabash Railway Company at the time of the said consolidation of 1865, as hereinafter alleged and as shown by the exemplified transcript herewith filed.

" This defendant further avers that said decree of the Supreme Court of Ohio was final, conclusive and binding on all the parties to the suit in which it was rendered."

Then, after setting up the adjudication of the Supreme Court of Ohio in the terms of the decree therein rendered, which were that these equipment bonds, of which the plaintiff owned a part, became, upon the consummation of the consolidation of 1865, an equitable lien upon all the railroad and real property which passed from the Toledo and Wabash Railway Company to the Toledo, Wabash and Western, and which was all of the railroad extending through the States of Ohio and Indiana, he avers :

" That said judgment and decree is still in full force and effect, unreversed and unsatisfied; that this defendant has now a good, valid and subsisting lien upon all of said property for the amount aforesaid, together with the costs of said suit."

Then after setting up the ownership in the Toledo and Wabash Railway Company in 1865 of a large amount of rolling stock and equipment of the value of over two millions of dollars, more than one-half of which was not subject to the lien of the mortgage executed by the Lake Erie, Wabash and St. Louis Railway Company to the Farmers' Loan and Trust Company (Indiana First Mortgage), nor to the lien of the mortgage executed by the Wabash and Western Railroad Company to Edwin D. Morgan (Indian Second Mortgage), he proceeds as follows :

"And this defendant further avers that a large amount of the terminal property, shops and yard property in the State of Indiana and elsewhere, and other real property in the said State on the line of said railroad, which was owned by said Toledo and Wabash Railway Company at the time of the said consolidation of 1865 and used in connection therewith, was purchased long after the said mortgage executed to said Farmers' Loan and Trust Company, and is in no way covered by or included in said mortgage or deed of trust; that a large amount thereof was purchased after the mortgage to said Edwin D. Morgan, trustee, was executed and is not covered by said mortgage or deed of trust to Edwin D. Morgan; but that the same belonged to said Lake Erie, Wabash and St. Louis Railway Company, the Wabash and Western Railroad Company and said Toledo and Wabash Railway Company free and clear of the lien of said two mortgages, but subject to the said lien of this defendant and upon which the said lien of this defendant is prior and superior to the liens of all other persons and corporations."

He further insisted that the railroad and other property in the State of Ohio upon which

"said lien of this defendant exists, as before stated, "ought not in equity to be sold in connection with or "as a part of any entire or connected system of rail-"roads;"

and he insisted that the priority of liens upon all of the said Indiana property as between himself and the two prior mortgages should be equitably settled; that the amount of earnings of the railway in the State of Indiana should be ascertained; the amount used for interest, operating expenses, &c., should be accounted for; the amount of rolling stock and equipment properly applicable to that portion of the railway in Indiana should be ascertained, and that in all things the equities of the lienholders on said portion of railway situated in said State of Indiana should be ascertained and the properly sold separately.

It will be observed that Judge TAFT recognizes the validity of the Ohio decree in so far as it affects the Indiana property. The terms of Section 5 of that decree are set forth in the record (p. 14), and consist of a declaration by the Supreme Court of Ohio that these equipment bonds, by virtue of the consolidation and the effect of the statute thereon, became a lien upon all the properties which were owned by the Toledo and Wabash Railway Company at the time of the consolidation, and which passed to and vested in the Wabash, St. Louis and Pacific Railway Company, being all of its property in the States of Ohio and Indiana, and that this lien is prior and superior to the lien of all the defendants in the action, etc. It was this lien thus declared, upon which Compton relied in appearing in the Indiana court and to which he asked effect given in that action.

It was precisely a similar declaration which the United States Circuit Court of Indiana enunciated in its decree, when it provided as to the unit lien thus declared by the Supreme Court of Ohio, that Compton could redeem the property in Ohio and Indiana by the payment into court of the sum named in the decree within the time named, or that in default thereof he should be barred of any further rights in said property. Very clearly the effect of the decree of the Supreme Court of Ohio was such that as against all parties to that suit it was an estoppel in the State of Indiana or elsewhere upon the questions there determined. No reason exists or is suggested why the Indiana decree does not create the same estoppel as to all the parties to it as the Ohio decree. The Ohio decree is relied upon to establish a lien in Indiana as to the parties to it, although it only declares the ex-

istence of such a lien and in no way undertakes to require any of the parties to make it effective. As Judge LURTON very properly observed (Record, p. 74), "if this Court reviewing the decree of the Circuit Court for the Northern District of Ohio has the authority to consider the question involved in the insistence for an entire redemption, then the Indiana Circuit Court could, under like pleadings and a like reservation of jurisdiction over Compton's lien, grant him proper equitable relief; this failure to appeal from the decree requiring him to redeem all or none is conclusive as an estoppel." The case of Union Trust Co. of N. Y. vs. Olmsted, cited *ante*, is in point to proposition that supplemental decree making effectual the decree by requiring the parties to execute conveyances, etc., is proper.

In Compton's brief in this case (p. 67) the following statements appear:

> "No suit was brought in one jurisdiction to foreclose all the mortgages on the railroad property as an entirety. * * * There was no effort or attempt in any of the suits to make all the parties interested in any part of this railroad property parties, or to adjudicate their rights, or by decretal provisions operating upon the parties to marshal, enforce, foreclose, or bar liens on the property outside of the jurisdiction of the Court."

In this statement there is the same entire misconception of the scope and character of the foreclosure proceedings which lies at the foundation of Judge TAFT'S reasoning upon this subject and renders it inapplicable to the case before the Court, as we have already had occasion to point out.

The parties and the subject matter in the Indiana case were the same as in this case. In each all the mortgagees interested in any part of the railway from

Toledo to the Mississippi River were parties. That Court had jurisdiction over both parties and subject matter through the power reserved by the Indiana decree over Compton and the purchaser.

The finding in the decree in the Indiana case determined conclusively the equities which Compton had under the Ohio decree as against all the parties to the Indiana suit. The decree, therefore, falls within the principle announced in *Lumber Co. vs. Buchtel*, 101 U. S., 638, in which the Court say:

"The finding of the record upon which judgment was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guarantee. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract and every defense requiring the negation of this fact is met and overthrown by that adjudication."

See, also,

Empire State Nail Co. vs. American Solid Leather Button Co., 74 Fed. Rep., 864.

Last Chance Mining Co. vs. Tyler Mining Co., 158 U. S., 683.

It was, therefore, a conclusive adjudication of the questions involved in this case, and sustained the motion to dismiss the appeal or to affirm the decree.

Respectfully submitted,

RUSH TAGGART,

Attorney for Wabash Railroad Company.

RUSH TAGGART.

HENRY CRAWFORD,

Counsel.

Office Supreme Court, U. S.
FILED.
DEC 19 1896
J. H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON,
Appellant,

vs.

JAMES R. JESUP and EDWARD H. DIXON,
Trustees,
Appellees.

Appendix to Brief of Wabash Railroad Company.

RUSH TAGGART,
HENRY CRAWFORD,
Solicitors.

C. G. Burgoyne, cor. Walker and Centre Sts., N. Y.—1895.

Opinion of Justices Jackson and Gresham.

THE

United States Circuit Court,

FOR THE NORTHERN DISTRICT OF OHIO—WESTERN DIVISION.

JAMES R. JESUP and ISAAC H. KNOX ET AL. vs. THE WABASH AND PACIFIC RY. CO. ET AL.	In Equity—Consolidated and Ancillary Causes, pending on the claims of James Compton.

Without setting out in detail the facts and questions presented on the claim of James Compton, we deem it sufficient to state our conclusions thereon, which are as follows, viz.:

1. That said Compton was in no way prevented or precluded from instituting or prosecuting his suit in the Ohio State Courts against the Toledo, Wabash and Western Railway Company, and others made defendants therein, by either the pendency of the Ham (or Tyson) suit, in the U. S. Circuit Court of Indiana, or by the judgment of the Supreme Court of the United States in said suit, denying the existence of any lien, legal or equitable, in favor of the equipment

bonds issued by the Toledo and Wabash Railway Company (Railway Co. vs. Ham, 114 U. S., pp. 587, 588): 1st, because he was not a party to that proceeding, and did not appear therein; 2d, because that Ham suit was not, in its inception, nor at the time Compton commenced his action in the State Court, such a class suit, or so representative in its character, as to bind him without his being or becoming an actual party thereto; and, 3d, because if said Ham suit had been so representative in its character as that the decree of the Supreme Court therein could or would have concluded said Compton on the question of the lien of the "Equipment Bonds," neither the pendency of said suit nor the decree of the Supreme Court were ever interposed by the defendants to his suit in the State Courts, either by way of abatement or in bar thereof, although ample time and opportunity so to do was afforded them. Under such circumstances the State Courts, having jurisdiction of both the parties and subject matter, were entitled to proceed and determine the questions involved.

Pomeroy's Remedies and Remedial Rights, §§ 396 and 399 and cases cited.
Grant vs. Ludlow, 8 Ohio S., 71.
Davis vs. Mathew, 39 Ohio S., 45.
Dimick vs. Revere Co., 117 U. S., 570.

2. That the decree of the Supreme Court of Ohio in said Compton suit (Compton vs. Railway Co. *et al.*, 45 Ohio St., 592) affirming the judgment of the Court of Common Pleas of Lucas County, Ohio, and declaring that said Compton's "Equipment Bonds," amounting with interest on May 1st, 1888, to the sum of $339,320.40, constituted a valid and subsisting lien on the property, etc., of the Toledo and Wabash Railway Company, which by mesne conveyances, consolidation and foreclosure had passed into the hands, possession and control of defendants therein, subsequent to 1862, and that said lien and priority over all mortgages executed by successor companies and interests acquired

and held thereunder by defendants, is a *conclusive adjudication* against all the defendants to said suit and their privies in estate or interests, of the amount, validity and priority of said Compton's claim upon the railroad and all property and the appurtenances thereto, originally owned by the Toledo and Wabash Railway Company.

McElmoyle vs. Cohen, 13 Peters, 312.
Cromwell vs. Sac Co., 94 U. S., 352.
Graham vs. Boston R. R. Co., 118 U. S., 101.
Dimick vs. Revere Co., 117 U. S., 570.

3. That Compton's said lien was and is inferior and subordinate to four certain mortgages made and executed by the four separate constituent divisions, which consolidated prior to 1862 and formed the Toledo and Wabash Railway Company in a mortgage executed by the Toledo and Illinois Railway Company, September 8th, 1853, to the Farmers' Loan and Trust Company as trustee, to secure the payment of its bonds to the amount of $900,000, a mortgage executed by the old Toledo and Wabash Railway Company, October 15th, 1858, to Edwin D. Morgan, trustee, to secure its issue of $1,000,000 bonds, a mortgage executed by the Lake Erie, Wabash and St. Louis Railroad Company August 1st, 1853, to the Farmers' Loan and Trust Company, trustee, to secure its issue of $2,500,000 bonds and a mortgage executed by the Wabash and Western Railway Company October 15th, 1858, to Edwin D. Morgan, trustee, to secure its issue of $1,500,000 bonds. The priority of these several mortgages over the lien of his "Equipment Bonds" was conceded by Compton in the State suit; but, if the priority of lien created by said four mortgages had not been admitted by him, such priority is clearly established. Neither the trustees in said four mortgages nor the beneficiaries therein, were parties to Compton's suit in the State court. Nor does the decree declaring the lien of his "Equipment Bonds" upon the railroad and

its appurtenances of the Toledo and Wabash Railway Company, and its priority over all liens and rights held by the several defendants to his suit, in any way affect said above-mentioned four mortgages, which were in full force pending his suit and which have been foreclosed in the above-entitled consolidated cause.

4. That, by his petition in the State suit, Compton prayed that his equipment bonds and the moneys due thereon, might be adjudged and declared to be a charge and lien "upon all of the property of said defendant The Wabash, St. Louis and Pacific Railway Company, that is situated in the States of Ohio and Indiana, so far as the same was owned by the Toledo and Wabash Railway Company at the time the property and franchises of the company last named were transferred to the Toledo, Wabash and Western Railway Company, and that the lien of said bonds on the property last mentioned has priority over all liens of all kinds now existing upon the same," except the four prior mortgages above referred to.

The Court of Common Pleas of Lucas County and the Supreme Court of Ohio adjudged that said "Equipment Bonds" were a lien upon the entire line of road indicated, both in Ohio and Indiana, and that such lien was prior and superior to the rights, interests, estates, claims and liens of each and all the defendants to the suit in and upon the railroad and property upon which said lien was declared. The decrees did not attempt to enforce said lien upon that portion of the line of road lying in Indiana, but directed a sale, in default of defendants paying the sum adjudged to be due to Compton of that portion of the railroad on which the lien was declared, situated in the State of Ohio and over which its Courts had jurisdiction—such sale of the Ohio portion the railroad to be made subject to said mortgages of September 8, 1893 and October 15, 1858, by the Toledo and Illinois Railroad Company and Toledo and Wabash Railway Company to the Farmers'

Loan and Trust Company and to Edwin D. Morgan respectively.

While the decree of the State Court did not attempt to subject the property in Indiana, on which the lien of Compton's equipment bonds was declared, for the manifest reason that such property was not within the jurisdiction of the Court, or within the reach of its process; still that adjudication, as against each and all the defendants to said suit, *conclusively* establishes, in this and all other Courts, where said decree is sought to be enforced, Compton's priority of lien on that portion of the railroad situated in Indiana. In other words, the Courts of Indiana and of the United States, sitting in and for the State, will, upon Compton's application, enforce the Ohio decree in his favor in respect to the Indiana property, as against the defendants to his suit. The Ohio Courts could have compelled the said defendants to give effect to said lien in Indiana.

Lewis vs. Clark, 16 Howard, 13.
North Indiana R. R. Co. vs. Mich. Central R. R. Co., 15 Howard, 243.
Booth vs. Clark, 17 Howard, 332, 333-4, and cases cited.
Phelps vs. McDonald, 99 U. S., p. 308, and cases cited.

5. That Compton's suit in the State courts did not so impound the property on which he sought to have his equipment bonds declared a lien as to prevent this Court from taking the actual possession and custody of the same during the pendency thereof. In the decree entered by this Court on March 23, 1889, it is declared " that, at the time of the filing in this Court of the original and amended and supplemental bills and the various cross-bills herein, said mortgaged railways, property and premises were in the possession of this Court through its Receiver, appointed by its order," and such possession continued until the same was

turned over to the purchaser under the sale directed by said decree (Cooper vs. Reynolds, 10 Wallace, 308).

It is also clear that Compton's suit and decrees therein did not in any way prevent or interfere with the foreclosure proceedings in this Court under mortgages prior, as well as subsequent, in date and right to his equipment bonds. Notwithstanding these foreclosure proceedings, Compton, after obtaining his decree in the Supreme Court of Ohio, could have proceeded with the execution thereof by a sale of the Ohio property covered by his lien. This Court declined to restrain him from so doing. He could have executed his decree as against the road in Ohio, without interfering with or disturbing this Court's custody and possession of the same. If he had proceeded with the execution of his decree, he would have sold and purchased subject to the two mortgages made by the Toledo and Illinois Railroad Company and the Toledo and Wabash Railroad Company in 1853 and 1858, which were being foreclosed in this Court, and in respect to which his lien and decree were subordinate. What would he have acquired by such execution of his decree? Nothing more than the rights or equity of redemption which the defendants to his suit held in property.

6. That this Court, having the rightful custody and possession of said railroad properties in Ohio and Indiana, under the proceedings to foreclose mortgages thereon, both prior and subsequent to the equipment bonds and the lien thereof declared in Compton's favor, was invested with proper authority not only to sell the mortgaged premises, but to adjust all questions of priority of lien thereon, so far as the same were not settled by prior decisions of Courts having jurisdiction, and to distribute the proceeds of sale according to the rights and priorities of the respective lien claimants. Compton having failed to proceed, as he was at liberty to do, with the execution of his State decree, and

being a lien claimant upon a portion of the mortgaged premises situate in Ohio and Indiana, sought to be foreclosed, was properly brought before the Court and made a party to the proceedings. Upon his coming into the Court, the defendants to his suit in the State Court, and others who had succeeded to their rights, or were privies in estate to them, raised issues and questions with him as to the validity of his decree and the lien of his equipment bonds as against them or the mortgage under which they claimed.

The Farmers' Loan and Trust Company, as trustee under the mortgages executed in 1853 by the Toledo and Illinois Railroad Company and Lake Erie, Wabash and St. Louis Company, and James F. Joy, as successor trustee to Edwin D. Morgan, deceased, in the mortgages executed in October, 1858, by the old Toledo and Wabash Railroad Company and the Wabash and Western Railway Company, were not parties to said issues with Compton and had no concern therein, the priority of lien of said four mortgages executed by the four constituent companies, which consolidated to form the Toledo and Wabash Railway Company, being unquestioned by said Compton and all other parties to the foreclosure proceedings. When the decree of sale was passed on March 25, 1889, by the Circuit Court of the Sixth and Seventh Circuits in the consolidated causes and foreclosure proceedings, the issues between Compton and those contesting the validity of his Ohio decree and the lien of his equipment bonds had not been determined, and said decree was accordingly made without prejudice to his rights, which were fully preserved and were to be enforced by said Courts, as might subsequently be determined. The reservation in the decree was not intended to adjudicate anything in Compton's favor, but merely to preserve his rights "*in the relation in which he now stands towards the mortgagees parties hereto.*" It was further provided that the Court reserved the power and authority to re-

sume possession of the property covered and affected by the said lien of Compton and enforce such decree as it might thereafter render in his favor, "*by a resale of such property or otherwise as this Court may direct.*"

7. That the Ohio decree, having established the validity and priority of Compton's lien as against all the parties defendant to his suit, the Courts of the United States, having possession of the property covered and affected by his lien under said foreclosure proceedings pending herein, should recognize and enforce said lien, as against all those bound by the decree in his favor, viz., the defendants to his suit in the State Court and those succeeding to their rights and title to the property of the Toledo and Wabash Railway Company, Compton's claim and priority of lien being thus established against all the parties to the foreclosure proceedings in this Court, except the trustees and "*cestuis que trust*" under the four above described mortgages of 1853 and 1858 and his rights having been reserved by the decree of sale, he is now entitled to the same measure of relief at the hands of the Court as would have been properly rendered him if his claim had been acted upon and determined when said decree af March 24, 1889, was passed. He is now entitled to nothing more, and nothing less. What decree of relief was he then entitled to, and how may the same now be substantially awarded him?

Under and in pursuance of said decree of March 25, 1889, foreclosing mortgages which were anterior to and superior to Compton's claim and lien, as well as mortgages subsequent and subordinate thereto, the property covered by said mortgages was sold on May 15, 1889. The sale was subsequently confirmed and possession given to the purchaser, or their assignee, the Wabash Railroad Company, the present owner, who has thereby succeeded to all the right, title and interest and estate of each and all the trustees and their respective

"*cestuis que trust*" in, to and under the several mortgages foreclosed. In so far as the purchasers or present owner acquired their title and estate in and to the property covered by Compton's claim and lien under the four mortgages anterior in date and superior in lien there is no pretense that he has any right to disturb such title or estate; nor has he any valid claim to have that sale set aside so as to afford him the opportunity or chance of a resale of the same. If his rights had been settled when the decree of sale was passed effect would have been given to his lien by either providing that the surplus proceeds arising from the sale of the property covered by his lien, after paying or discharging the prior liens thereon, should be paid over to him, or that he might redeem said prior mortgages and then sell the property for the satisfaction of both the amount paid to redeem and of his own claim, As an equitable lien claimant his right, as against the mortgages ahead of him, was either to redeem or take the chances of obtaining a surplus arising from the sale of the premises. It appears that no surplus over and above the mortgage debts having priority to his lien was realized from the sale of the property, so that there is no fund in the hands of the Court, or purchaser at the sale, applicable to the payment of his lien.

8. There being no fund arising from the sale with which to pay, or apply on, Compton's claim, the question is presented whether this Court, under the reservation made in the foreclosure decree for the protection of his rights, should now resume possession of the property and order a resale thereof, or of that portion situated in Ohio, in order to give Compton an opportunity to bid thereon, or should he be allowed to redeem the same within a reasonable time to be fixed by the Court. It is earnestly insisted that this Court should enforce the Ohio decree by ordering a resale of the property covered by the lien situated in the State of Ohio. This mode of relief is not proper at the

hands of this Court, which had the undoubted right, in connection with the Circuit Court of the Seventh Circuit, to foreclose the four division mortgages which were ahead of Compton's lien, notwithstanding his decree and proceedings in the State Court. Said Circuit Courts had also the right and jurisdiction to foreclose the mortgages subsequent in point of lien to his claim. The purchasers have succeeded to the title and estates under both classes of mortgages. Compton's equity or lien was superior to one set of said mortgages and inferior to the other. In respect to a sale of the property covered by the mortgages of the latter class, he has no right to question the purchaser's title or demand a resale of all or any portion of the mortgaged premises. All that he can rightfully or equitably claim now at the hands of this Court is that, having a lien subordinate to some and superior to others of the mortgages, which have been properly foreclosed, he should be allowed to redeem from the purchaser, who has succeeded to the rights of the former, and, upon effecting such redemption, add or attach his claim thereto and then sell for the whole, unless the mortgages subsequent to his lien, or those who have succeeded to their rights, should redeem from him.

This Court, in connection with the Circuit Court for the Seventh Circuit had jurisdiction over the property, both in Ohio and Indiana, covered by Compton's lien and the four mortgages which antedated and were superior to his lien. The foreclosure sale covered and embraced the entire line, which originally belonged to the Toledo and Wabash Railway Company, which issued the equipment bonds on which Compton's claim and lien was founded. That entire line of road was subject to the prior lien of the four above-mentioned underlying mortgages, which were also foreclosed. As against the purchaser of the property (the entire line of said road in both Ohio and Indiana) Compton cannot be allowed to select and redeem detached por-

tions thereof. He must redeem the whole or none. The Supreme Court of Ohio adjudged that, as against the defendants to his suit, Compton's lien was upon the entire line of said road, lying in both Ohio and Indiana. That Court directed only a sale of that portion of the road situate in Ohio, because its execution process could extend no further. But this Court and the Circuit Court of the Seventh Circuit having full jurisdiction over the entire property, and having jointly and concurrently carried on the said foreclosure proceedings and passed the decree of March 23, 1889, and having together heard and determined Compton's case can award him such relief in respect to the entire road on which his lien rests as he is deemed entitled to. The mortgage lien under the four above-mentioned mortgages of 1853 and 1858, having priority over Compton's lien, amounted, as shown by the decree of March 23, 1889, and by the report of the Special Master, Bluford Wilson, to the sum of $8,540,058.09, on February 1st, 1889, and our conclusion is that he should be allowed to redeem the entire line of railroad formerly belonging to the Toledo and Wabash Railway Company, together with the equipment and terminals assigned thereto by the decree of March 23, 1889, upon paying or tendering payment to the Wabash Railroad Company, the present owner of said line and property, of said sum of eight million five hundred and forty thousand and fifty-eight and $\frac{9}{100}$ dollars ($8,540,058.09), with interest thereon from February 1st, 1889, together with the taxes and interest thereon, which said Wabash Railroad Company has paid upon the property since confirmation of the sale.

Such redemption will be confined to the property of said Toledo and Wabash Railway Co. line as passed to the purchaser under the foreclosure sale, but will not cover or include additions thereto made by the purchasers or their assignees, the Wabash Railroad Co., since the sale.

Compton will be allowed ninety days from the entry of the decree in conformity herewith, on his claim or lien, within which to make and perfect said redemption, and if not made within that time his claim upon the property, and every portion thereof, will be forever barred. Should the redemption hereby allowed be made, then the purchasers at the foreclosure sale, or the Wabash Railway Company, as the successor to their title, will be allowed sixty days within which to pay said Compton's entire debt upon the premises including both the amount of his Ohio decree, with interest thereon and the sum required to redeem with interest thereon; and, in default of such payment to him, the premises will be resold at public auction, after being duly advertised for ninety days, to satisfy and discharge Compton's entire debt against the same.

Fulghaw vs. Colton, 3 Tennessee, Ch. 299.
Edmiston vs. Lyde, 1 Paige, 641.
Simmons vs. Taylor, 38 Fed. Rep., 682.
Smithett vs. Harbeth, L. N., 44 C. D., 161.
Parker vs. Fuller, 1 Rup. & M., 656.
Cloud vs. Hamilton, 3 Yerger, 81.
Collins vs. Riggs, 14 Wallace, 493.
Allis vs. Ins. Co., 97 U. S., 144-146.
Bradley vs. Snyder, 14 Ill., 263, and cases cited.
Wood vs. Holland, 3 S. W., 739; Story's Eq. Jur., § 1023, and notes.
Cholmy vs. Oxford, 2 Atkins, 267.
Fell vs. Brewer, 2 Bro. C. C., 278.

9. That the claim of Compton to priority of lien on certain terminal property at Toledo, Ohio, is not well founded. In the decree of March 23, 1889, the Court found that the parcels of real estate embraced in terminal properties and attached to the various divisions of said railway (Wabash St. Louis and Pacific Railway Company) are to be regarded as *accessions* to said divisions, respectively, and are subject to the lien of the divisional and of the respective general mortgages, in the order of their respective priorities. We are not

disposed to disturb this finding and adjustment, although Compton was not heard thereon when it was made; for the reason that, under the language employed in describing the property intended to be covered by and embraced in the mortgage of the Toledo and Illinois Railroad Company of 1853, and of the Toledo and Wabash Railroad Company of 1858, the terminals at Toledo, which Compton seeks to reach, and subject to payment of his claim, may fairly be treated and considered as *accessions* or *accretions* to the mortgage property or as included in said mortgages, under the authority of Thompson vs. White Water Valley Co., 132 U. S., pp. 68–75. There is nothing in the reservations of the decree of March 23, 1889, which requires the Court to order a resale of the property covered by Compton's equitable lien. That lien was, in fact, discharged by the foreclosure of the four mortgages ahead of it, and which foreclosure Compton had no right to interfere with or delay. The reservations in the decree of sale were not intended and cannot affect the purchaser's title acquired under these mortgages. We cannot properly, therefore, direct a resale without disregarding the prior right of said mortgagees and of the purchasers who have succeeded thereto. If we had the discretion so to do, it should not be exercised in his favor; for it does not appear that any larger sum could be obtained on a resale; it is not shown that it sold for an inadequate price, and Compton offers no guaranty or security that a resale will bring a larger amount and realize a surplus to which he would be entitled. It is not proper for the Court to order resales as a matter of experiment, and thereby cast a cloud upon the title of the purchasers or present owner. As stated by the Supreme Court in Robinson vs. Iron Railway Co., 135 U. S., 530, his failure "to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale." Besides he was free to bid at the sale already made, as he would be upon a resale. Under

such circumstances, we give full effect to his equitable lien by allowing to redeem the property upon the terms indicated.

Harris vs. Gunnell, 9 S. W., 376.
Miller vs. Kendrick (N. J.), 13 Cent., 352.
Farmers' Loan & Trust Co. vs. Bankers' & M. Tel. Co., 119 N. Y., 15.

If it is desired that the taxes paid by the Wabash Railroad Company since the sale, which Compton is required to refund with interest in redeeming, should be ascertained in advance, then a reference may be had to ascertain the same; and the time occupied in the execution of such reference will not be counted or included in the ninety days allowed for effecting redemption, as above provided. Should Compton fail, neglect or decline to redeem within the time and upon the terms above indicated and permitted, he will be taxed with the costs of the proceedings in this Court upon his claim.

HOWELL E. JACKSON,
Circuit Judge Sixth Circuit.
WALTER Q. GRESHAM,
Circuit Judge Seventh Circuit.

167
Supreme Court, U. S.
FILED
DEC 3 1896
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

No. 314.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL., APPELLEES.

REPLY TO BRIEF FOR APPELLEES.

JUDSON HARMON,
JOHN G. MILBURN,
JOHN H. DOYLE,
For Appellant.

DECEMBER, 1896.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL., APPELLEES.

REPLY TO BRIEF FOR APPELLEES.

I.

COMPTON'S OHIO DECREE AND THE DECREE IN THIS CASE BASED THEREON ARE THE ONLY SOURCE AND MEASURE OF COMPTON'S RIGHTS.

The error which underlies the entire argument for appellees, the pointing out of which is in itself a sufficient general answer, is that it persistently treats Compton as asserting a claim upon equipment bonds. Thus, on page 36, they say, "and the rights Compton has in this case, who is seeking to assert a lien upon the entire property as a unit," viz.,

the lien of the equipment bonds which was on the entire property in Ohio and Indiana.

Compton, however, not only has the decree of the supreme court of Ohio, finding a specific sum to be due him, directing its payment and ordering the sale of the Ohio property in case of non-payment, which decree alone he set up in his answer, but he also has a decree in this case finding the specific amount due him *by virtue of his Ohio decree*, the enforcibility of which was the only thing reserved for future determination, the purchaser being ordered, in case such determination should be in Compton's favor, to pay him within ten days the full amount so found due.

II.

NO CAUSE SHOWN FOR GOING BEHIND COMPTON'S JUDGMENT.

Counsel seek (p. 14 *et seq.*) to bring this case within the principle of Lawrence Mfg. Co. *vs.* Janesville Mills, 138 U. S., 561, by reason of the fact that Compton in his answer not only set up his decree as a lien upon the property, but also asked relief in aid thereof by an apportionment of the equipment used upon the entire system of which the Ohio division was a part, and by the subjection to his decree of certain terminal property in Toledo.

As no such relief was granted him and he is not here complaining of its refusal, these portions of his answer are, for present purposes, as though they had been entirely stricken out. He stands here now upon the terms of his decree, reiterated by the decree in this case, and upon them alone. He asks no addition, diminution, or modification. His decree is complete in itself. It requires no "piecing

out," and none has been attempted. On the contrary, even if what he asked was "piecing out," it was refused him.

But the principle of the case cited operates only to attach such conditions as the Court may find just to the action it takes to cure defects in a decree, or as a reason for refusing such relief, and cannot be justly applied to deny an independent lien, perfect in itself, which, when presented, the ordinary rules which apply to foreclosure proceedings require every court to recognize and protect. The fact that Compton at one time asked more than this and failed to receive it can certainly not affect rights in no way dependent on what he so asked. Judge Lurton and counsel for appellees appear to think he should be punished for asking more than he was entitled to by denying him what he would otherwise get as of common right.

Moreover, we know of no case in which the principle now invoked has ever been applied to a defendant brought in against his will for the express purpose of cutting off his rights, and therefore compelled in self-defense to set them up and ask their protection and enforcement in such proceedings as the court might take in behalf of other parties.

Whatever his answer may have contained beyond this, he has, since the original decree herein finding the exact amount due him, directing its payment by the purchaser, and ordering the sale of the property covered by his lien in case of non-payment, which amounted to a denial of all additional relief asked by him, from which decree neither he nor any other party ever appealed, sought and is now seeking no right save that which necessarily follows from the full and complete judgment of the Ohio court and of this Court, now that the sole issue reserved has been deter-

mined in his favor; and he is seeking this not voluntarily, but because he was forced into the case against his will and deprived of the right of enforcing his original decree in the court which rendered it.

The principle of Lawrence Mfg. Co. *vs.* Janesville Mills, 138 U. S., 552, is totally inapplicable here. The bill was to restrain the use of a trade-mark by the successor of a company against which the complainant had, by consent of counsel, obtained a decree finding in complainant the exclusive right to the trade-mark and enjoining the defendant, *but not its assigns*, from using it (p. 561). The bill sought to "piece out" the decree in this respect and then enforce it against a successor of the defendant. The court having found in another case brought by the complainant that it had, in fact, no such right to the trade-mark, declined to grant the relief claimed, by virtue of this *consent decree*, against a third party. Counsel omit the sentence which follows what they quote and which is the gist of the case, viz:

"The prior decree was in consequence of the consent and not of the judgment of the court, and, this being so, the court had the right to decline to treat it as *res adjudicata*" (p. 562).

Moreover, the decree sought to be extended and enforced was by the same court, and therefore entitled neither to the respect of comity nor to that enjoined by the Constitution.

It will be noted that Compton was made a party to this case very shortly after the rendition of his decree and while he was proceeding to carry it into execution.

III.

THE WABASH COMPANY HAS NO RIGHT TO QUESTION THE EXISTENCE OF COMPTON'S LIEN AND RIGHTS BY VIRTUE OF HIS JUDGMENT.

True, its purchase was under a decree foreclosing the first and second mortgages, which antedated both Compton's decree and the consolidation agreement on which it was founded. But the holders of those mortgages had no right to question Compton's judgment *as a subsequent lien*, which is all it professes to be. If he claimed for it priority over those mortgages, as to the property they covered, then and then only could they dispute it. In *Hassall vs. Wilcox*, 140 U. S., 493, on which counsel rely, Wilcox claimed that his lien, though obtained after that of the mortgages attached, became, by the statute of Texas, prior to the mortgages. In the decree appealed from this claim was sustained and his lien ordered paid before payment to the mortgagees. (See p. 503.) Of course, as the latter were not parties to the case in which he had sought to establish such prior lien, they were not concluded from contesting the priority claimed. It was not held that they could contest the lien of the judgment as such. There is nothing in the case to sustain the point for which it is cited.

The question whether the effect of a State statute is a question of general law on which the United States courts refuse to follow the decisions of the State or not is immaterial here. Such question can arise only where the United States court is asked to give effect to such statutes between parties whose rights, dependent thereon simply, are before

it for adjudication. It cannot arise where one of the parties has a judgment of the State court, because, whether in the opinion of the United States court the construction given by the State court was right or wrong, the latter court has in fact given a judgment which creates rights. The only object of the last part of section 2 of the act of Texas in question in *Hassall vs. Wilcox* was to simplify proceedings to enforce the class of claims mentioned in the act, which are usually small, by permitting a sale without marshaling liens, which would necessarily be subject to the right of lienholders not made parties to question the facts giving priority over them, if such priority be claimed. There was no decision by the courts of Texas giving the act any different construction. All the Texas district court had done was merely to render judgment on the lien. It was not competent for the legislature to enact that the vested rights of parties to priority of lien might be affected without a hearing, and we submit that such was not the intention of the act.

In Compton's case the supreme court of Ohio construed the Ohio statutes under which the consolidation took place, but it went further and entered a decree in Compton's favor, fixing a lien on this very property which it is not competent for any other court to reverse or disregard, and this judgment related back to the commencement of the action; but it did not undertake to disturb the vested rights of prior lienholders.

No attempt was made before the master or elsewhere to question any *fact* upon which the decree in Compton's case was founded, nor is it even claimed that it is desired now or hereafter to question any such fact. The only thing as-

sailed was and is the construction given by the supreme court of Ohio to the statute of Ohio.

It is certainly a novel proposition that a mortgagee can question the lien, *qua lien*, of a subsequent judgment obtained *bona fide* against the mortgagor. If the Wabash Company can question the lien of Compton's judgment it could relitigate every case in which a judgment for damages resulting in a lien by statute has been rendered against the mortgagor company after the date of the mortgages foreclosed.

The Wabash Company as purchaser stands for the mortgagor as well as the first and second mortgagees or rather will so stand when its purchase is freed from the conditions of the decree in Compton's favor. True, Compton cannot disturb its possession of the property of his judgment debtor or of its assigns without proving the existence of his lien; but he does this by presenting his decree against the former owner of the property with its approval in this case. That being regular and *bona fide*, as is admitted, the Wabash Company cannot question the existence of the lien, but only its priority, if claimed, over the mortgages to which that company is subrogated. It bought subject to whatever rights Compton's lien gave him in case it should be upheld.

Simmons vs. Taylor, 38 Fed., 682, does not sustain the contention of counsel. If our position were the one taken by the master in that case the decision reversing the master would be an answer to us; but our position is not such at all. Persons claiming to have liens by virtue of a mortgage securing income and equipment bonds filed a bill to redeem the railroad from the purchaser under a prior mortgage.

The court held (top of p. 685) that the purchaser "under the peculiar facts of this case" had succeeded to the rights of the mortgagor as against the later mortgage. The master found (p. 684) that the bonds held by the parties claiming to redeem "were never issued on behalf of or for the benefit of" the mortgagor, had not been signed by the trustee, that the holders were not innocent holders for value, "and there is no ground therefore for holding these bonds to be valid and enforcible."

One of these holders, who for one or more of these reasons it was held could not enforce his bonds against the company which made them, seduced the master with the theory that this, though true, was none of the purchaser's business. Of course, the same rule would apply to stolen bonds, possibly even to forged bonds.

But suppose the holders of those bonds had *bona fide* decrees of a court of unquestionable jurisdiction against the former owner, finding and adjudging liens and ordering their enforcement. Suppose the facts of issue by the company, etc., had not been questioned.

In short, the only right the purchaser in that case claimed or could claim was to raise the same questions the former company might have raised as to the validity—the real existence of the bonds. If for any reason the former company was concluded on those questions the purchaser was also concluded.

It is the vigorous remarks of the Court in that case, addressed to such holders of invalid or fraudulent bonds who had come voluntarily into court demanding affirmative relief, which counsel, with apparent sincerity, apply to Compton, who was forced into court against his will and com-

pelled to set up a confessedly *bona fide* judgment of the Supreme Court of the State which created the corporation he had trusted, rendered in an action which antedated all those now before this Court.

Besides, the claim now advanced completely ignores the fact that specific issues were framed in this suit as to the lien and decree of Compton, and only those issues were reserved for trial by the proviso in the decree for sale.

There were and are no issues drawing his lien in question on any of the grounds now under discussion. The first and second mortgagees presented no issues as to the validity of Compton's lien or decree, and the Wabash Railroad Company as their successor and in their right cannot now raise them.

How do the questions now made arise in this case? They are not presented in any pleading. Compton was brought into this suit against his will to answer an allegation that his decree was barred by the decree in the Ham suit, and the relief sought against him was that he be enjoined from enforcing his decree. He answered, after trying to get discharged from the case, that his decree was not barred by the decree in the Ham suit; that he was not a party to the latter; that the Ham suit was not pending when he commenced his suit in Ohio; that the issue in that case when commenced and up to the time of its dismissal did not involve the lien of the equipment bonds under the consolidation statute of Ohio and the agreement of 1865 made under it; and that no plea in bar or other pleading setting up the pendency of the Ham suit or the decree obtained in it was filed in his action in the State court. Those were the issues questioning the lien which

were reserved for trial after the sale; but now we find it attacked on other grounds, formulated nowhere but in the brief of counsel, in which Compton is treated as a moving party in the suit seeking affirmative relief.

IV.

INDIANA MORTGAGEES NOT PARTIES TO THIS SUIT.

On pages 23 *et seq.* counsel seek to show that the trustees of the two mortgages on the Indiana division were parties to this suit below, although it was brought in the court of the northern district of Ohio to foreclose mortgages on the property in Ohio. The object is to establish a basis for the claim that the purchaser has succeeded to the alleged rights of the Indiana mortgagees to object to separate redemption of the Ohio property. Counsel rely, *first*, on the necessity for an apportionment of the equipment; *second*, on the fact that Joy, the trustee of the second Indiana as well as of the second Ohio mortgage, attached to his answer and cross-bill in this case a copy of the Indiana mortgage; *third*, on the fact that the parties who had mortgages covering more than the Ohio division set them up fully by filing copies of their pleadings thereon in the other jurisdictions.

As to the first ground, it is plain that there was no intention to obtain a decree operating directly on the fixed property in Ohio and indirectly on the rolling stock of the entire system by order *in personam*. The pleadings were not drawn for that purpose, nor was the decree so framed. On the contrary, it is clear that the plan was simply the common one of decrees in the various courts, each operating

only on the property within its jurisdiction, but, by being simultaneous, accomplishing the broader object desired. This manifestly would give to the decree in each court no greater effect in itself than it would have if there were no property or proceedings elsewhere.

It is therefore giving an unnatural turn to the Ohio case to claim that the trustees of the Ohio mortgages must be held to have been parties also in their character as trustees of the Indiana mortgages. Certainly they claimed nothing in the latter capacity and nothing was adjudged them. They therefore brought into the case no outside rights for the purchaser to inherit.

As to the second ground, if Judge Taft was not correct in the statement that Joy's attaching the Indiana mortgage was a mere inadvertence, then Joy did not set up his Ohio mortgage at all. The former is the only one he filed with his answer; yet the decree foreclosed his Ohio mortgage.

As to the third ground, it is the common practice when mortgages covering property in several jurisdictions are to be foreclosed, especially when it is to be done on the concurrent plan, to print the bill and mortgage in one case and file copies in the others, merely changing the caption. Just this and nothing more was done in this instance. Each pleading was mere surplusage in so far as it referred to proceedings or related to property in other jurisdictions, and was so regarded both by the parties and by the courts. The same course was taken with the decree. Yet it was plain that each suit was entirely independent in law and in fact of all the others, and that each related only to the property within the jurisdiction of the court in which it was brought.

The attempt now to give each suit an omnibus character

is unfair and misleading. If any one of them was of that nature, the others were entirely unnecessary.

The apportionment of the equipment was accomplished on the simple mileage basis, not by the decree operating in any one case, but by its simultaneous entry in all.

But Compton is asserting here merely a lien on the fixed property in Ohio. His rights are not now complicated by any question of apportionment of equipment. If he is permitted to redeem the Ohio division alone, he will doubtless have to do so subject to the provisions made by the decree below to apply in the event of separate divisional sales, one of which, made on behalf of the separate mortgagees before Compton had filed his answer, was that the equipment should be divided in proportion to mileage.

V.

COMPTON'S RIGHT TO SEPARATE REDEMPTION.

The part of the brief under the head "Were there separable equities of redemption?" page 27 *et seq.*, simply affords another instance of the persistent ignoring by counsel and the judge who sustained them below, of the dignity, force, and effect of Compton's judgment in the Supreme Court of Ohio, which, no matter upon what it was based, became, *ex proprio vigore*, a complete source of right. By whatever course of reasoning that court reached its conclusion, it did exercise its supreme right of adjudging the case of the parties before it and attaching that judgment to the property within its jurisdiction. Then and thereafter what had been a mere equity became a fixed legal right, not only created but adjudged and its enforcement decreed.

The fact that in setting up his equipment bonds in that case and claiming a lien by virtue of them Compton asserted that they were a lien on the entire line of the company which issued them, consisting of both the Ohio and Indiana divisions, serves to emphasize the action of the court in limiting its action to a decree for sale of the Ohio division only.

In the paragraph of his opinion on page 40 of the Record, a small portion of which counsel quote (brief, p. 30), Judge Taft gave full force and effect to Compton's judgment in the Ohio court. The question under discussion was whether Compton has a right to redeem the Ohio division. The entire paragraph from which counsel quotes is as good a statement as can possibly be made of the necessary legal effect of Compton's judgment on this question; I therefore quote it:

"Though for the reasons given I do not think Compton may have a resale of the Ohio division, it seems clear to me that he may redeem it by paying to the purchaser, the Wabash Railroad Company, the amount due on the Ohio divisional mortgages. As against all the parties to his Ohio suit, he may exercise this right because it was incident to the relief granted in the Ohio decree, to wit, the sale of the Ohio division subject to those mortgages. This prevents objection from the purchaser as assignee of the rights either of the defendant corporation, The Wabash, St. Louis and Pacific Railway Company, or of all the mortgagees with liens junior to Compton's, or of the Wabash Railway Company and the Toledo, Wabash and Western Railroad Company, predecessors in title of the defendant, for these were all parties to the Ohio decree. As the assignee of the rights of what party to the cause below can the purchaser object to the redemption of the Ohio division and mortgages? Have the Ohio mortgagees a right to object? It is difficult to see

how they can complain if their debts are paid in full, as they must be if Compton shall redeem. All that they can require before submitting to redemption is that Compton shall have acquired an interest in the equity of redemption. The owner of the equity when this suit was brought was the Wabash, St. Louis and Pacific Railway Company. The Ohio decree established that, as against that company, Compton had obtained an interest in the equity from the Toledo and Wabash Railway Company, one of its predecessors in title, and the immediate grantee of the mortgagor Ohio companies. The Ohio mortgagees cannot dispute this transfer of an interest in the equity of redemption to Compton. When a mortgage is given the mortgagor does not thereby restrict his right to convey or incumber the equity of redemption in him (1 Jones on Mortgages, 676; Hodson *vs.* Freat, 7 Wis., 263; Flanagan *vs.* Westcott, 11 N. J. Eq., 264). It therefore follows that conveyances or decrees binding upon the original mortgagor or his privies, with reference to the ownership of the equity of redemption or an interest in it, are with reference to the mortgagee *res inter alios acta*, which he has no right or concern to impeach or dispute."

Judge Lurton, on the contrary, in the passage quoted (brief, bottom p. 30), reverts again to the lien which Compton had by virtue of his bonds. We think that for this reason his discussion is beside the case. But it is submitted that there is no analogy between the case of a purchaser who assumes to pay two mortgages as part of the purchase-money and that of a consolidation of railway companies, because in the former case the peculiar features which result from consolidation are lacking. By consolidation the new company, which is really the old one in another form, succeeds to all its rights as well as to its lia-

bilities. There is, therefore, no purchase-money and no agreement between the new company and the old ones, because they cease to exist when it comes into being, created by their agreement among themselves with the aid of the statute.

But all such refinements are unnecessary if Compton be steadfastly considered as a judgment creditor with his lien as such declared by the court and its enforcement ordered, and not as the holder of a naked equitable lien or right.

VI.

NO CONSOLIDATION OF OHIO AND INDIANA MORTGAGE LIENS.

On pages 33 and 34 of the brief counsel contend that the effect of the agreement of consolidation and of the statute authorizing it was that "The first-mortgage bonds in both "States were consolidated and treated as one general obliga- "tion; so, likewise, were the second-mortgage bonds." On page 38 it is said, "Not only by the articles of merger of 1858, "but by express agreement of the Toledo and Wabash Rail- "way Company to pay the four liens, they became in sub- "stance a concrete mortgage debt resting on the whole road "in the two States. At present, by virtue of its purchase at "the foreclosure sale, the Wabash Railroad Company holds "as a single lien the entire four mortgages in the two States. "The appellant's lien being therefore subject to all these "mortgages upon this unit of property, he can only entitle "himself to any results out of the property on the principle "of a redemption from an unforeclosed senior lien. The "rule is universal that the redemption must be total. The "creditor cannot be compelled to split his debt or his secur-

"ity. The Wabash Railroad Company, therefore, holding "as a single lien the entire mortgages in the two States, is "not compelled to release any of the property to the com- "plainants except upon the tender of the entire amount of "the four mortgages."

This is an entire misapprehension. The Ohio consolidation statutes provided "that all debts, liabilities, and duties "of either of said companies shall henceforth attach to said "new corporation and be enforced against it *to the same ex- "tent as if said debts, liabilities, and duties had been contracted "by it.*"

In other words, the new company was substituted for the old as the debtor on each set of bonds, but the mortgages were not in any way affected; they were not amalgamated. On the contrary, the statute distinctly provided that "all "liens upon the property of either of said corporations shall "be preserved unimpaired."

Wilcox, Railroad Laws of Ohio, p. 137, sec. 5.

The first consolidation was in 1856. There were then in existence only the two first mortgages. The consolidation agreement provided that the consolidated company "shall "assume and be liable for all the outstanding bonds, in- "debtedness, and other liabilities of each of the parties to "this agreement, and all mortgages given by either of the "parties shall be as valid and binding upon the whole of the "road, real estate, fixtures, and personal property *which may "be described in such mortgage* as though the same had been "originally executed by such consolidated corporation." (Court of Appeals Record, p. 305.)

The second consolidation was that of the Toledo and

Wabash Railroad Company and the Wabash and Western Railway Company in 1858 forming the Toledo and Wabash Rail*way* Company. The agreement contained precisely the same clause as the previous one above set forth. (*Idem*, p. 321.)

The next consolidation was that of 1865, forming the Toledo, Wabash and Western Railway Company. The only provision in the agreement for this consolidation was that relating to the protection of the bonds and debts. (*Idem*, p. 327.)

Thus there is nowhere anything blending the mortgages or treating them as at all different from what they were at their creation—mortgage liens on specifically described property.

In the decree of foreclosure herein they are recognized, recited, and treated as such. (Decree, pp. 2, 3, 4, 5, 6, 7, 9, 10, 12, 13.)

Compton's right to redeem arises from his holding a junior lien. The right, from its very nature and definition, is to redeem the property covered by his lien. He cannot be required to redeem more than this in the absence of some agreement or undertaking by him like that of a purchaser who, by a single obligation, assumes the payment of separate mortgages as part of the purchase-money. Compton has made no agreement or undertaking whatever, so that this principle cannot be applied to him.

If it should be conceded that Compton's right to proceed against and sell the Ohio property separately might have been successfully attacked on the ground that the obligation of the new consolidated company to pay the two Ohio and the two Indiana mortgage debts so merged them

that it could not pay one without paying all, it would be a sufficient answer that, although the company which then owned the equity of redemption as against all the mortgages and the holders of all the mortgages except the two on the Ohio property and the two on the Indiana property were parties to his action in the Ohio court, none of them sought to oppose the severance of the Ohio property in the decree for sale, or if they did their attempt was overruled, in either of which events all rights in this respect are now cut off.

Whether the equity to redeem which originally existed separately as to each of the four mortgages was or was not lost or merged in a general equity to redeem from all four mortgages as a unit, Compton, in securing his decree for the sale of the Ohio property alone, subject to the two mortgages thereon, necessarily secured, as a lawful incident to that decree, against every party to the case, the right to redeem the property covered by that decree from the prior liens thereon. Of those not made parties to the decree, the Ohio mortgagees had no interest in the question, nor had the trustees of the Indiana mortgages, because by no amount of plausible and ingenious reasoning can any interest in the equity of redemption of the Ohio property be traced to them. The only ones in whose behalf any such equitable right could have existed, viz., to object to redemption of the Ohio property alone, were the constituent companies, if they can be assumed to be the promisees of the statutory obligation of the new company to pay all debts. But those companies are dead, and without heirs as to this right, which, from its nature, could not well pass to the new company against which it existed or survive the merger which would result

from such passage. This serves to emphasize the distinction between Wells *vs.* Tucker, 51 Vt., which was between the parties to a promise to pay and the case of a new company created by consolidation, which merely takes the place of the old companies, whatever the terms of the agreement between the latter may be.

The very thing, and the only thing, which Compton's judgment impounded was the equity of redemption of the Ohio property. If he had been permitted to proceed to a sale, the purchaser, whether himself or another, would have acquired merely the equity of redemption of the Ohio property. The court below, being a court of equity, was bound, in determining Compton's rights, to consider that done which had been duly ordered to be done, and was therefore obliged to treat him as actually invested with whatever rights a sale under his judgment would have conferred. Is it possible to maintain the position, in this view of the case, that he was compelled to redeem other property as well as his own? To test the matter still further, suppose the sale had been made and confirmed by divisions, and the Ohio mortgagees had bought in the Ohio property, is there any doubt that Compton would have been entitled to redeem that property by paying off the two Ohio mortgages? Or, if the Wabash Company had been the purchaser, would it have had any greater or different rights than the mortgagees? Then it must be contended that the mere fact that the sale was of the entire property together worked the mysterious change in the situation which counsel so laboriously strive to establish—and this, too, in spite of the fact that the decree provided, for the benefit of divisional lienors, a divisional basis of

distribution in case of a unit sale. Can it be possible that if, on that basis, there had been a surplus above the two Ohio mortgages its payment to Compton could have been resisted? He was recognized by the saving clause as the holder of a lien by judgment on the Ohio division, and distribution to him would have followed as matter of course.

Yet when it comes to putting him to the remedy of redemption, which is a mere incident to his legal rights, it is claimed that the state of the case becomes entirely different.

The cases cited (Brief, p. 38) do not limit the right of a creditor to pursue one of several properties which are subject to his claim. They simply deny him the right unduly to charge the others by releasing some. Thus in Cooper *vs.* Stevens, 1 Johns. Ch., the mortgagor released one of the mortgaged parcels. In a case in the same volume, Cheesebrough *vs.* Millard, p. 408, the mortgagee was permitted to enforce his entire claim against part only of the property it covered.

In Allen *vs.* Clark, 17 Pick., 47, it was held that if two parcels are included in one mortgage, and the mortgagor convey one, he cannot compel his grantee to contribute to redeem from the mortgage, and that, where the mortgagor conveys one of the parcels to one person and the other to another, and then becomes insolvent, the second grantee, upon paying the whole sum, may have contribution.

Athill *vs.* Athill, 16 Law Rep., Ch. Div., 211, was a case of heir against administrator, and the question was whether two mortgages, one of freehold and one of leasehold, for the same debt, should contribute ratably, or whether one was a mere collateral security. It was held they should so

contribute; but this was merely applying the principle of contribution and has nothing to do with the right of the mortgagee to pursue either tract alone.

In Barnes *vs.* Racster, 6 Jurist, 595, R., in 1792, mortgaged Whiteacre to B. In 1795 he mortgaged the same to H. In 1800 he mortgaged Whiteacre and Blackacre to B. to secure a further advance and so as to make both liable for B.'s two advances. In 1804 he mortgaged both to W. Whiteacre alone was not sufficient to pay the first charge on it; Blackacre would pay the whole of B.'s demands; but both estates were insufficient to pay all the mortgages. H. claimed to throw all of B.'s demands on Blackacre alone. It was held that he had no equity as against W. to do so, but that such debt ought to be thrown ratably on both estates. B. was, as the court remarks, wholly indifferent, but W. objected to having B.'s claim thrown on Blackacre alone. R. had no rights, as the property was insufficient to pay his debt. The whole question was between others than the original mortgagor and mortgagee. The court say that the mortgage of 1800 had the effect of making Whiteacre and Blackacre ratably liable to B. "That, I think, would have been the result between the different heirs of R. had he died intestate and insolvent as to his personal estate, leaving one person his heir as to Whiteacre and another person his heir as to Blackacre. At least, the heir of Whiteacre could not have claimed more as against the heir of Blackacre." This is evidently the same principle as in Athill *vs.* Athill, *supra*, and does not establish the proposition that the mortgagee could not have pursued either estate alone.

So none of the cases cited appear to sustain any such

rule as that asserted, and therefore it seems useless to inquire how and in what cases such a rule should be applied.

Compton has surrendered no right he ever had. If the Wabash Company will pay him, as it agreed, its subrogation to his rights will be complete so far as any release by him is concerned.

VI.

PURCHASER BOUND TO ACCOUNT FOR NET EARNINGS.

The brief on this point (pp. 54–5) and Judge Lurton's opinion present another example of the result of looking at this case with but one eye.

The purchaser, it is said, succeeded to the rights of the owner of the property as well as to those of the mortgagees. His possession, therefore, is referable to the former as well as to the latter and does not require him to account to Compton for net earnings. The answer of Judge Taft to this claim (Rec., pp. 48, 49) is conclusive, but we beg to add the following:

The reservation in the decree, with its proviso that the purchaser should pay Compton the full amount of his judgment with interest, *as part of the purchase-money*, if the judgment should be found to be a valid lien, or, in default of such payment, that the property should be resold, made the purchaser's possession conditional only. It is admitted that the purchaser did not make such payment and is consequently in default. Its possession, therefore, in so far as it is referable to the rights of the mortgagor, became, from and after such default, possession in trust for Compton. If the court had proceeded to retake and sell the property, as

provided in the decree, could the purchaser have set up its conditional possession, which became wrongful as soon as ten days elapsed after the adjudication in Compton's favor, as a reason for retaining the net profits obtained thereby, as against Compton's claim? If the purchaser had been permitted to retain possession during the proceedings for resale, it would have been in effect a receiver of the property. Putting Compton to redeem is merely a substituted remedy for resale, and therefore necessarily the case is the same in this respect as it would have been in case of ordering a resale. The purchaser is, in effect, a receiver as to net profits until Compton's claim is disposed of. Yet the opposing argument puts Compton in the position he would occupy if he had not been a party to the case, or had no reservation in the decree, and the purchase and possession had no reference or relation whatever to Compton's rights.

In the sight of equity the sale, so far as Compton is concerned, is considered as set aside, whatever remedy the Court may award him. This must necessarily be assumed in order to give Compton any rights at all, because, being a party, they are cut off except in so far as they are saved by the reservation in the decree. Therefore it is mere reasoning in a circle to treat that sale as made and confirmed, so far as it conveyed the equity of redemption to which Compton's lien attached, so as to be a bar to his claim to the net profits.

In the ordinary case of foreclosure to which a junior lienor is not a party, the purchaser assumes no obligation whatever to the junior incumbrancer. He merely succeeds to the possession of the mortgagor. In this case, by the terms of

the very decree under which it bought, the purchaser undertook to pay Compton's claim and pledged whatever it obtained by the purchase, which included possession, as security, by virtue of agreeing to the proviso for a resale. Its possession is therefore not adverse to Compton, but is for and on his behalf until he is paid or secures his rights by resale or redemption. It obtained possession, not from the owner of the equity of redemption, but from the receiver whose possession impounded the earnings so far as necessary to pay the claims of the parties to the suit. The purchaser must, until Compton is disposed of, be considered as merely holding the possession it obtained from the receiver. In other words, the purchaser cannot be heard to claim the benefit of an absolute purchase of the rights of the mortgagor, as against a party for whose security the decree makes the purchase conditional, in a case where the property had been already taken from the owner who was the only person entitled to hold it without accounting.

VII.

FAILURE TO APPEAL FROM THE DECREE IN THE CASE IN INDIANA DOES NOT ESTOP COMPTON.

The essential differences between the issues in the case in Indiana and those in the case in Ohio, together with the reasons why the decree in one did not affect the other, are stated by Judge Taft. (Rec., p. 49.)

What was the object of proceedings in each jurisdiction if it was not to dispose in each of the property there situated?

Suppose Compton had appealed in the Indiana case and

not in this, could the court in Indiana have ordered a resale of the Ohio property if it had acceded to his claim for a resale? Remember again that the privilege of redemption awarded him is only a substitute for the resale, granted by virtue of the clause "by resale or *otherwise*" in the decree, and therefore can be awarded, as to the Ohio property, only by the same court which had jurisdiction to order a resale.

It seems unfair to seek now to take advantage of the fact that, merely to save the trouble of drawing separate decrees in each court, counsel caused the same one to be entered in all, just as they had filed the same pleadings in each, leaving the parts which related only to property in the others to be treated as surplusage. But fortunately laziness cannot become the parent of rights, or rather of wrongs, in this case at least.

It is said that Compton claimed a lien on the Indiana property by reason of the *finding* of the Ohio court that his bonds constituted a lien on the property in both States. If this be so, it follows, then, that he has lost his claim to a lien in Indiana by not exercising the right of redemption within the time named by the Indiana court nor appealing from its order, which required him, as a condition of redeeming the Indiana property, to redeem the Ohio property also. But he set up in Indiana no rights by virtue of his *decree for sale* in the Ohio court, so that no decree was or could have been made by the court in Indiana relative to such rights. These rights he set up in this case only. They were dealt with in this case only. How, then, can his appeal herein be imperfect because not accompanied or supplemented by an appeal elsewhere? If he had appealed in both cases, would each appellate court have had the same

subject-matter and the same issues before it? Would he not still be asserting in one his claim to an equitable lien on the Indiana property, and in the other his legal rights in the Ohio property by virtue of the judgment of the Supreme Court of Ohio operating directly on that property?

We have sought to avoid mere repetition of our former brief, though some repetition has been unavoidable.

We have made some references to the record below, because opposing counsel have done so suggesting the possibility of the entire record being certified.

VIII.

CONSTRUCTION OF THE RESERVATION OF THE DECREE.

In view of the suggestion that the whole record be certified, and of what has been said by counsel under this head (Brief, pp. 48–50), we beg leave again to state our view of the true construction of the provisions of the decree as to Compton, which, with all due respect to the learned judges below, entitle him to a better remedy than the redemption about which they differ.

The language of the proviso is so plain and clear that a wayfaring man could not err therein. It declares what is to be done "*if upon the determination of such issues* (those thereafter to be made as to Compton) it shall be adjudged by this court that the decree (Compton's) * * * and the lien thereby declared continue in full force and effect." In that event "the *purchaser* * * * of that portion of the property * * * covered and affected by said lien * * * *shall pay* to said James Compton, or his solicitors

herein, within ten days after the entry of the decree herein in favor of said Compton, the sum of," etc.

The difficulty which has been made about giving this its plain, simple, natural force and effect has arisen from the last clause of the next paragraph, which provides that "notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton *shall proceed to a final determination*," etc., "it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands toward the mortgagees parties hereto."

The clause last quoted is made to overthrow the proviso on the ground that, as the proviso gives Compton rights which he would not have had without it, it is, therefore, necessarily inconsistent with this subsequent declaration of intention. In other words, the second paragraph is made entirely to overthrow the first.

The highest rule of construction is that which requires effect to be given, if it reasonably may, to all the language used, because otherwise there is a necessary reflection upon the author of the language. The person who drew the decree must, upon the theory of the court and opposing counsel, be found guilty either of a deliberate attempt to trick Compton or of a lack of ability to use language intelligently or remember in one paragraph what he had put in the preceding one; but there is upon the face of the decree the clearest proof that the proviso and the clause which is made to destroy it are consistent, and must therefore both be given effect. This proof is in the fact that the proviso by its express terms indicates what is to be done *after the determination* of Compton's issues, while the succeeding

paragraph by its express terms provides *for the trial of Compton's issues* and regulates the situation *before the determination thereof.* In order that the trial to ascertain whether he had a right or not might proceed without embarrassment or delay, it was provided that, *for the purposes of such trial and determination*, the *rights* of Compton should be preserved in his then position; but, the *determination once made*, his *remedy* was that set forth in the proviso. Not only is this a meaning which may fairly be adopted to give effect to both paragraphs, but it is the natural, ordinary, and, in fact, the only proper meaning.

Whether the purchaser of the Ohio division should or should not become also the purchaser of the other divisions could make no difference with respect to this right of Compton's which by the terms of the proviso was to arise and attach against the purchaser from the moment the issues were determined in his favor.

Respectfully submitted.

JUDSON HARMON,
JOHN G. MILBURN,
JOHN H. DOYLE,
For Appellants.

DECEMBER, 1896.

Office Supreme Court, U. S.
FILED.
DEC 3 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON,
Appellant,

vs.

JAMES R. JESUP and EDWARD H. DIXON,
Appellees.

Additional Brief for Wabash Railroad Co.

HENRY CRAWFORD,
RUSH TAGGART,
Solicitors.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON,
Appellant,

vs.

JAMES R. JESSUP and EDWARD H. DIXON, Trustee, and others,
Appellees.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Additional Brief for Wabash Railroad Co.

In 1889, after over four years' common administration by the receivers of the Circuit Courts of Illinois, Indiana and Ohio, the entire Wabash system in the three States, together with all equipment, appurtenances and franchises, was sold as a unit, under identically the same decree entered by all the courts, each foreclosing

two general and ten divisional mortgages and adjudging their rights *inter sese*.

Compton's claim of a junior equitable charge upon the railroad in Ohio and Indiana, as adjudged by a decree of the Ohio Supreme Court, was reserved, without prejudice, for later adjudication.

On the final hearing, in 1892, upon the equity reserved, the Circuit Courts in Ohio and Indiana (Judges JACKSON and GRESHAM sitting) rendered the same decree, adjudging to appellant a single equitable lien upon the railroad in the two States, but subordinate to four mortgages. It required him to redeem all such senior liens within a time fixed or be forever barred from asserting any claim upon the property or disturbing the title acquired at the general foreclosure sale.

His failure to accept that decree or exercise such redemption right is a conclusive admission that the railroad of his original debtor, the consolidated company of Ohio and Indiana, considered as a single property, was not worth the aggregate of the four senior liens with which it was encumbered when appellant's equipment bonds were issued. His equity, if enforced as it in fact exists, has consequently no real value.

An appeal is prosecuted from the Ohio decree. None has ever been prayed or perfected from the similar decree in Indiana and the bar of that adjudication in terms foreclosing the whole right of redemption in both States, has by lapse of time become conclusive.

The main proposition of law sent up by the certificate is, whether appellant is entitled upon this record to a reversal of the Ohio decree and the allowance of a new recovery which shall in terms annul the Indiana decree and recognize his right as a lien creditor to force a severance of the railroad at the Indiana State line

and permit him to now seperately redeem and be subrogated to the two Ohio mortgages and ultimately resell that division alone, as though it was an independent property, entirely disconnected from and owing no relation whatever to the remainder of the system heretofore sold as a unit under the common decree of all the courts?

It fully appears by the certificate that many of the points in controversy have been conclusively decided by the concurrence of all the Judges and are not here for review.

The discussion will be aided by stating the propositions which, according to the opinions, are already *res adjudicata* against appellant.

They are as follows:

(1) The Circuit Courts in the three States held the entire railroad and appurtenances under lawful seizure and administration. They had undoubted and exclusive jurisdiction to entertain the dependent bills of mortgagees, irrespective of citizenship, to marshal all creditors, adjudge all priorities and sell under foreclosure an absolute title to the entire railroad, free of all liens and remit all creditor rights to the fund.

(2) On being served with substituted process, appellant became fully subjected to the jurisdiction with plenary power to adjudge the validity, extent, amount and rank of the lien claim he asserted and the particular relief to which he was entitled.

(3) He has no first lien upon the Toledo terminals.

(4) The effect of the saving clause in the general foreclosure decree operated to reserve Compton's lien

from the general sale and to retain it on the property sold.

(5) By the sale, the purchaser acquired the titles and equities of the consolidated mortgagor and all the mortgagees whose liens were foreclosed. Compton's remedy on the further consideration of the cause as to his lien was to be such as he would have been entitled to in equity against such mortgagees.

(6) The equitable charge adjudged by the decree of the Ohio Supreme Court, was for the benefit of all equipment bonds and not exclusively for those held by Compton. The same reasoning also established a like lien in favor of every unpaid creditor of the consolidated corporation of Ohio and Indiana. All such liens are of equal rank and cannot be equitably enforced save by a ratable distribution of the security among all those entitled to share.

(7) As the record discloses the absence of divers creditors equally entitled with Compton, who are, therefore, indispensable to any proper decree of foreclosure, redemption or distribution, the Circuit Court decided rightly that Compton was not entitled to ignore the confirmed sale or to foreclose his junior lien and separately resell the Ohio Division for general payment of liens thereon.

In so far as they bear upon the undecided points now certified, these rulings conclude the litigants and must be accepted as the law governing the further controversy.

It will be also assumed in the further argument that the vital principles of the single decree of foreclosure

allowed by all the Courts as a common adjudication are not to be now radically subverted by supplemental orders allowed by one of the Courts upon the determination of a subordinate reserved equity.

Seton on Decrees, 15.

The main question on which instruction is asked is:

" Had Compton the right under the saving clause of " the decree for sale to a decree for the redemption of " of the Ohio division only ? "

According to Judge TAFT, the nature of the remedy to be awarded under that reservation is wholly undefined.

" It must be determined wholly apart from anything in " the decree for sale, because the saving clause leaves " it entirely in the judgment of the Court.

" In other words, the saving clause simply remits us " to the Ohio Supreme Court decree, to determine " therefrom, by general rules of equity practice and " jurisprudence as they may be modified by local law, " what relief should have been granted to Compton in " the Court below " (Opinion, p. 31).

The purchaser maintains that the main question upon which instruction is asked should be answered in the negative upon two grounds.

1. As an original proposition, the appellant is not entitled, upon general rules of equity practice and jurisprudence, to overreach the confirmed unit title to the railroad by a separate redemption of the Ohio Division as incident and preliminary to the separate foreclosure and sale thereof.

2. As against the senior liens neither his State Court

recovery or the saving clause in the general foreclosure decree conclusively adjudge him any such right or remedy.

I.

First. The application to annul a title and new interests arising under a confirmed foreclosure sale and be let in to partially redeem, is an appeal to the discretionary exercise of equity power. In case of railway property, when the purchase is of several years' standing, and necessarily new rights of great magnitude have intervened, abrogation of such title should not be allowed except upon the most indubitable equitable considerations, taking into due account the pleadings, the personal status of the party moving for redemption and resale, the absence of parties necessary to a complete decree, the relative rights of other encumbrancers and the injurious consequences of such belated and disturbing redemption to other mortgagees, purchasers, intervening equities and the public interests.

In discussing the right of a creditor who holds a debt created in 1862 to force at his election a permanent and hurtful severance of the Ohio and Indiana divisions, it is important to consider that they ceased to be separate properties in June, 1856 and were then legally consolidated and became one company (Certif., p. 11).

Continuously since that date they have never been owned or operated separately, but have been in law and fact integral portions of an indivisible railroad, owned by a single entity, having one name, seal, stock, membership, administration, equipment and treasury, exercising a unit franchise and a single indivisible capacity as a consolidated body of the two States to exist and enter into contracts.

The rights of appellant arise from his holding certain equipment bonds issued by this consolidated company.

He acquired such securities with full notice in the public records that his obligor was a single interstate railroad company and its entire undertaking, income and accretions were already encumbered by four mortgages executed by its predecessor companies, the absolute payment of all which it had in the agreement of merger expressly assumed as personal obligations.

The appellant claimed in his State court suit that the issue of equipment bonds which were originally mere unsecured debts, by force of the subsequent merger with the Illinois companies in 1865, became entitled in equity to a charge upon the entire railroad in Ohio and Indiana which the corporate owner thereof contributed to the consolidation. This view was sustained by the decree he obtained in the Ohio Supreme Court.

The question to be debated, therefore, involves the right of a junior creditor, whose debt and subsequently accrued charge in equity arose out of two interstate consolidations, to nevertheless overreach and practically nullify both mergers and as against resisting prior mortgages force a dismemberment of a public highway at the

boundary line across which a lawful consolidation was effected more than forty years ago.

As sold in 1889, the Ohio division of 71 miles constitutes the eastern terminal over whose rails passes the gathered traffic of an important trunk line system owning nearly 1,000 miles and further reinforced by the business contributed from divers connections and allies.

During the long period since 1856, when the Ohio and Indiana roads ceased to be separate properties, the constant demand of expanding trade has necessitated, from time to time, the acquisition of extensive and costly elevator, yard and shop facilities at the eastern terminus in Toledo. Of course, their purchase was out of the single purse and though territorially in Ohio, they are in the larger and truer sense of the term accretions to and appendages of the whole system and not merely of that division considered seperately.

The appellee holds under a confirmed purchase made and possession delivered under common decrees of the three courts, of the entire road, equipment, appurtenances and franchises as a unit.

The Court will take judicial notice that in the customary course of reorganizing such properties, millions of securities have been issued under general mortgages based upon the single title so acquired. The ownership of such commercial paper has been constantly shifting; fresh and heavy expenditures have been required for betterments, additions and equipment. To a large extent, new interests which have become involved during the intervening seven years, would suffer incalculable injury by either the allowance or exercise of any such divisional redemption and severance as proposed.

In measuring the disastrous consequences which would result from any decree allowing the Ohio road to be taken out of the system by a third rank creditor, the Court will also note the fact that at the State boundary there is no other rail connection or outlet whatever, save over the Ohio division, for the volume of traffic controlled by that portion of the system west of that junction point to reach Lake Erie or rail connections at Toledo.

Necessarily, the divisional redemption and ultimate separate foreclosure would annul the present title and possession of the road in Ohio. The appellee would, in consequence, cease to be a corporation owning or operating any road in that State or exercising any franchises therein.

Its bond securities to the extent of the property thus withdrawn from the overreached common mortgages would be clouded and depreciated. If the equipment bond lien should ripen into full ownership of the Ohio division, the eastern 71 miles would hold the throat of the system. As a an independent property it would possess the undoubted right to terminate traffic connections at the State line and ruinously isolate the road west of that junction to the irreparable depreciation of the two Indiana mortgages, which are confessedly superior to the equipment bonds. It could refuse through trains or bills of lading or impose arbitrary rates upon all business exchanged with the Indiana and Illinois divisions, which would be reduced to a mere dependent road.

The mere existence of power to thus establish a commercial blockade at the State line and arbitrarily command the only outlet of the Western roads, whether oppressively exercised or not, would consti-

tute a serious impairment of all securities based upon the existing title and single operating control.

If the power of traffic severance was put in actual practice or onerous conditions were imposed, it would, to a large extent, destroy the revenue of the road west of the Ohio State line and to that extent confiscate the security and subject its operations and earnings to the dictation of those who would become the owners of its only Eastern outlet.

In Simmons vs. Burl. &c., Ry., 159 U. S., 286, where a junior lienor sought to open a foreclosure sale and redeem, it was stated as a rigid principle governing such applications;

" to constrain a court of equity to grant relief so
" apparently inconsistent with previous proceedings
" and so destructive of the rights of persons who have
" since become interested, the case should be clear
" and free from doubt."

In the first instance appellee maintains as a substantive proposition that Compton is not entilted, under general rules of equity, to overreach the purchasers' present confirmed unit title to the railroad by a separate redemption as preliminary and incident to a foreclosure of the Ohio division.

He made no actual tender of the amount due on the senior Ohio mortgages or costs or proportion of the heavy Receiver's and preference debt. He neither pleaded an offer to pay them off as a condition of resale or alleged his readiness or financial ability to practically accomplish the redemption if it was awarded him.

He not only failed to pray for such redemption, but the particular specific relief he did demand as his absolute right was radically inconsistent with any theory or

obligation of precedent redemption as a condition of relief.

After the lapse of eight years he has no present equity to cloud or annul the title because the Court did not gratuitously award him a species of relief which in terms and by conduct he unequivocally renounced.

His right to the specific remedy of a divisional redemption at his option is supported upon the principle that, if a case is in fact stated for which such relief would be appropriate, the general prayer will by implication authorize the appropriate remedy.

The appellant is not within the protection of that doctrine.

Uniform equity practice has established certain conditions precedent which rigidly govern the application of a junior encumbrancer when he comes to redeem a prior mortgage.

If the senior lien has not been already enforced, it is material and indispensable that the bill should duly exhibit the complainant's right to redeem and include a distinct offer to pay off the first mortgage.

Dalton vs. Hayter, 7 Beav., 313.
Truman vs. Wearing, 3 De Gex & S., 729.
Way vs. Mullett, 143 Mass., 49.
Kopper vs. Dyer, 59 Vt., 477.
Goldsmith vs. Osborne, 1 Ed. Ch., 560.

When there has been a radical change in the situation resulting from an actual foreclosure of the elder encumbrance and a new title has been created by judicial sale and third parties and new equities have been brought in, the undoubted weight of authority is that the junior encumbrancer will not be allowed to disturb the title or possession except on condition that the en-

tire senior mortgage debt and costs be first actually tendered and paid into Court with his bill.

It being the policy of the law to support the stability of judicial sales and afford reasonable protection to titles thus acquired, equity will not cloud a confirmed sale by a mere optional decree of redemption which is not asked and may never be availed of. On any theory the actual tender of the mortgage and proportional share of the Receiver's and preferential debt is a condition precedent to relief.

Knowles vs. Rablin, 20 Iowa, 101.
Twombly vs. Cassidy, 82 N. Y., 155.
Brobst vs. Brock, 10 Wall., 519.
Collins vs. Riggs, 14 *Ibid.*, 491.
Bryan vs. Brasius, 162 U. S., 415.
Erwin vs. Pike, 118 *Ibid.*, 248.
Kelsey vs. Crowther, *Ibid.*, 405.
Loud vs. Pom. Land Co., 153 *Ibid.*, 546.

In Robinson vs. Iron Ry., 135 U. S., 522, a decree dismissing a bill filed by second lien creditors to reopen a railroad foreclosure was affirmed mainly upon the ground that complainant made no offer to redeem.

" The failure to make the offer is evidence that he " does not think the property was worth more than it " brought at the sale."

At the hearing the Circuit Court had proposed to allow complainant,

" to amend his bill by making an offer to redeem and " accept a decree of the Court limiting the time there- " for, and on default in making such redemption, to be " forever barred and foreclosed of all right, title and " interest in said property and said complainant de- " clined said offer."

The rule was again enforced in Cunningham vs. Macon & Bruns. Ry., 156 U. S., 425, wherein it was said :

" Conceding that the second series of bonds were " secured by a second mortgage, their holders cannot " equitably be allowed to avoid the sale without *tender-* " *ing reimbursement of the amount of the first mort-* " *gage.*"

" Their claims were subordinate to those of the " holders of the first series and they have no recourse " until the latter are paid, and it would be grossly " inequitable to allow them to avoid a sale which has " been ratified by those who were primarily interested " in the price resulting therefrom, without compelling " them *as a prerequisite* to do equity by protecting the " first encumbrancers."

Especially ought the Court to refuse relief where the divisional sale and severance which would result from such partial redemption would reverse and permanently nullify the main principle of the foreclosure decree common to all the Courts, settling divisional rights and ordering a unit sale.

If obedience to the precedents is to be required, the pleading of appellant, even upon the theory that he had a right of separate redemption, was fatally defective and failed to state a case which authorized the Court to vacate a confirmed sale and decree a mere option of partial redemption.

The opinion says that the Court may " treat his " prayer for general relief as a prayer for a decree for " redemption."

Unfortunately for that hypothesis Compton's answer contained no such prayer.

His pleading was framed as a cross-bill, and upon averments raising new issues and requiring new testimony, he demanded an accounting and an affirmative decree, differing radically on several matters from the recovery allowed by the Ohio Supreme Court. The specific relief he asked was utterly inconsistent with

the theory of an ordinary bill to redeem, to enable him to foreclose both his own lien and those to which he would be subrogated.

Instead of conceding the priority of the elder divisional mortgages, he alleged they were in fact subordinate to his own charge upon the Toledo terminals and a large portion of equipment.

His sole prayer for relief was that without any prior payment whatever to the purchasers by way of redemption of the Ohio mortgages, but on their mere failure to pay to him the amount due on his own third lien bonds, the Court should at once, and without any payment or even indemnity from him, vacate the title of the unit purchaser to the Ohio Division, resume possession thereof and order its resale upon his charge entirely separate from the remainder of the system, and distribute the proceeds to the liens according to their respective divisional priorities.

His intervention and his constant attitude both below and here conclusively attest that he has always, as of deliberate choice, expressly waived any claim to relief by way of usual redemptionary rights, through payment of and subrogation to acknowledged superior liens.

To now reverse the Circuit Court because the remedy he rejected was not volunteered as a gratuity over his inconsistent election otherwise would constitute the Circuit Court of Appeals, and this Court as well, tribunals of original cognizance to decide questions not within the issues or agitated below and therefore not within the scope of a Court exercising only appellate power.

In discussing the very redemption suggested in the certificate, the appellant at this bar vehemently pro-

tests against being even now made "the victim of this unusual, exceptional and severe remedy" (Brief, p. 51).

His main insistence is that this Court should now instruct the judges to reverse themselves upon a fundamental proposition upon which they are agreed and which is not covered by the certificate.

He argues that, consistently with established principles, he cannot be put to redeem at all, and that the instruction should go down that he is entitled, as a matter of absolute property right, to have the Ohio division retaken into judicial custody and resold separately without reference to what may be the rights of the unit purchasers or of the senior mortgagees upon the Indiana division and without requiring him to pay the two Ohio liens or any part of the Receiver's debts as a condition of resale (Brief, p. 46).

By his pleading and attitude in the cause he has of choice permanently elected to stand by a specific relief of a character inconsistent with the remedy of partial redemption suggested by the first question. He is therefore conclusively estopped from claiming a reversal because the Circuit Court did not award him a particular remedy he did not ask and which in terms and by conduct he renounced.

The effect of mere delay in asserting a right to redeem from the foreclosure sale of a railroad has been considered in Thompson vs. W. W. V. R. R., 132 U. S., 68; Robinson vs. Iron Ry., 135 *Ibid.*, 530; and Simmons vs. Burl., &c., R. R., 159 *Ibid.*, 278.

In those cases the doctrine was enforced that mere non-assertion of such right for short periods will deprive them of any relief against the intervening superior equities of purchasers of railway properties

under senior mortgage foreclosures or those who have become interested under them.

In the ruling last cited, special importance was laid upon the fact that the under lienor at the time of the sale decree " did not assert any right or any intention to redeem."

" He has of course a right to redeem, but if he " chooses not to assert such right and stands by while " the sale is made and confirmed he must in equity be " deemed to have waived it."

In the absence of actual tender or even a pleaded offer of readiness or financial ability to pay off the senior mortgages the confirmed purchase ought not on the peculiar facts of this record to be subverted and Compton awarded a purely speculative relief by giving him a time option to redeem the Ohio division liens or not as he might thereafter elect.

Second. Compton is not entitled to a separate redemption of the Ohio division, because he persistently refuses to do equity, and parties in interest whose presence is indispensable to any effective decree are not in Court.

The certifying Judges concur in the conclusion that the fund sought to be realized for distribution as the ultimate consequence of any such redemption constitutes, on any proper construction of the Ohio State Court decree, a common fund in which all equipment bondholders and other creditors of the Toledo and Wabash Railroad Company of 1858 have an equal right to share.

Judge TAFT upon this point holds, "Justice both to "others interested in the property and to the co-lien- "holders themselves would seem to require that all the "co-lienholders should be parties to enforce the lien of "any one of them and that the decree should provide "proper relief for all of them" (Certif., p. 39).

Appellants' position is likened to the equity of a tenant in common to redeem and then call upon those in equal interest with him to contribute and "on "their failure he may foreclose and bar their liens."

He absolutely refuses to accept any such relation or to recognize any community of interest whatever between himself and "the other co-lien holders," or to acknowledge that the redemption to be awarded will be available to enforce any claim except his own.

His brief at this bar insists that "his suit was not a "representative suit" and "no other person was en- "titled to the benefit of that decree and it is not avail- "able to any other equipment bondholder as an ad- "judication" (Brief, p. 51).

The State Court decree in express terms required all the net proceeds of the sale of the mere equity of redemption after the payment of costs, should be paid into court "to abide its further order herein on the footing of this "decree."

If such sale had been actually made and Compton had personally bid off the property, it is an indisputable proposition that, as he only held one-quarter of the equipment bonds, he could only have utilized them as a payment of one-fourth of his bid.

All the other bonds equally entitled could have come in under the decree. He, as purchaser, would have been required to pay three-fourths of the bid in cash to be distributed on the $450,000 bonds not held

by him. If the purchase had been made by a third party, appellant could under no circumstances have drawn from the registry to exceed twenty-five per cent. of the net sale proceeds available to the entire security.

In sustaining the appellant's right to a separate redemption in Ohio, Judge TAFT's opinion fails to give any practical effect to the theory of a common security which can be subjected only to ratable distribution.

The Ohio adjudication declared to be a class recovery is spoken of as "Compton's lien" as though it was exclusively personal.

It is erroneously assumed (Certif., 29, 48) that appellant could have used that decree as an effective personal bidding power, instead of money, under the general foreclosure decree, to the extent that he would be entitled to all the proceeds of the Ohio division remaining after the first and second mortgages thereon had been paid.

Compton insists that he is not in any way concluded by the decree in the Ham suit, which was adverse to the class upon the merits because he was not a record party to that litigation.

Yet in order to enable him to grossly enlarge his normal distributive share of a common fund and inequitably absorb the entire security, it is asserted by him with apparent seriousness that all other equipment bondholders, even though they, like him, were not parties, should be held absolutely barred by the decree in the Ham suit. Appellant seeks by this method to constitute himself the sole beneficiary of the State Court decree in violation of its text and spirit.

His demand is that a recovery finding the rights of a class and awarding him one-fourth interest of a

common equitable charge should be somehow combined with and qualified by another decree adjudging that the class was not entitled to any lien at all, so that the whole fund must of necessity be now awarded to him (Brief, 52).

In other words, that the only practical effect of the victory against the class in the Ham suit was to enlarge his distributive share and hand over to him the entire joint security adjudged under the Ohio decree.

He contumaciously repudiates the suggestion that he is seeking any relief for the enforcement of a common right. He refuses to be subjected to those equitable conditions which the Court adjudges are inseparably annexed to his actual relation to his associate bondholders and the joint fund.

He avowedly seeks relief to accomplish the ouster of all other bondholders of the class and to inequitably appropriate the entire fund for himself.

His refusal to do equity, his set purpose to absorb a joint security and defeat the equality in which equity delights, constitute of themselves adequate reason why the Court should not open to such an applicant the bar of the full redemption decree which he has already rejected.

Jackson vs. Ludeling, 21 Wall., 662.

The absence of necessary parties constitutes another insuperable objection to the suggested divisional redemption.

Federal judicial power has always been administered in subordination to the maxim that equity will not award a decree which will be obviously ineffective.

The rule which requires that the Court must have before it all parties whose presence is necessary to a

complete determination of the controversy, is rigidly enforced. Whenever it is made to appear that the interests of absent parties are so involved in the subject matter at issue and the relief demanded that their presence is essential to a complete decree, the Court will refuse to award any relief.

Shields vs. Barrows, 17 How., 130.
Barney vs. Baltimore, 6 Wall., 284.

On the record as presented it would be inequitable, considering the adjudged class nature of the Ohio State Court recovery, to order any decree for the exclusive benefit of appellant. As it is not possible to frame a decree which will adequately protect the absent equipment bondholders who are collectively interested under a common title, the Court cannot properly order a foreclosure sale of the equitable charge decreed to the equipment bonds in a suit so fatally defective for want of necessary parties.

A. & D. R. R. vs. Orr, 18 Wall., 471.
N. O. Pac. Ry. vs. Parker, 143 U. S., 58.
In re Mersey Ry., 37 L. R., Ch. Div., 610.

On this proposition the judges are agreed (Certif., p. 39).

The senior Circuit Judge however holds the view that, although no re-sale of the Ohio division upon the Ohio decree can be allowed on the present defective record, yet it was reversible error for the Circuit Court to fail to award appellant a separate redemption of that property.

It is argued that he is entitled to this specific remedy "because it was incident to the relief granted "in the Ohio decree," to wit, the sale of that division subject to the two senior mortgages.

It is difficult to appreciate upon what principle of law it can be said the Circuit Court decided rightly in refusing the main relief of resale, and yet decreed erroneously in refusing a particular remedy which was merely incidental and preliminary to that relief by resale which it would have been error to allow.

The objection that indispensable parties are absent from the record is just as fatal to the proposed redemption as to the attempted foreclosure and resale in direct enforcement of the Ohio decree.

Any redemption on the footing of the State Court recovery must necessarily be effectuated on the basis there adjudged that Compton holds only one-fourth interest in the common charge. Any reinstatement of the two senior Ohio mortgages as unforeclosed liens would not be for his exclusive benefit, either as to redemption or ultimate foreclosure and distribution, but would inure to the ratable benefit of co-bondholders.

The subsisting community of interest prohibits any dealing by him with the joint security that would either prejudice the rights of absent claimants or to any degree enlarge his own fixed distributive share.

Bissell vs. Foss, 114 U. S., 252.
Turner vs. Sawyer, 150 *Ibid.*, 578.

A suit for redemption by a junior encumbrancer is framed in the double aspect of redeeming from the senior lien so as to enable him to foreclose his own and on subrogation sell under both.

Equity only extends the right of redemption as ancillary and provisional, in aid of the ultimate relief whereby the subordinate lien is to be foreclosed and the redeemed estate again resold. The redemptionary right is so completely dependent on the right to

foreclose that if the applicant is for any reason precluded from the ultimate remedy he will not be let in to provisionally redeem.

Fisher on Mortg., 1194.
Rhodes vs. Buckland, 16 Beav., 212.

Consideration of the anomalous situation which would inevitably result from the actual exercise of any divisional redemption in the present state of the record will demonstrate that the proposition is altogether inadmissible.

In event of accomplished redemption the precise result would be this: the title of the purchasers to the Ohio railroad would fail; the corporation as to that State and the mortgage security therein situate would be expunged; the local mortgages of 1853 and 1858 would be reinstated as subsisting unforeclosed liens equitably assigned by subrogation to appellant, who had redeemed not in his own exclusive right, but as the adjudged one-fourth holder of a subordinate equitable lien. The holders of the remaining three-fourths interest are not before the Court.

Even if the Indiana bondholders had no equitable rights, easements or equities on the Ohio division, which is hereafter denied, the opening up of the foreclosure decree *quoad* the Ohio railroad, and the reinstatement of the mortgages thereon, would also fully restore as unextinguished all the undoubted redemptionary rights of the consolidated and general mortgages as against the entire class of equipment bondholders.

The appellee clothed with the equity of those mortgages, could unquestionably redeem from any redemption effected for account of the equipment bondholders, and no decree could possibly be framed consistently

with established precedents, adjudging to appellant the right to redeem from the first and second Ohio mortgages which did not include adequate provisions enabling the mortgages which are subordinate to the equipment bond lien to redeem in due course from the first redemption.

Necessarily this would require that the entire amount due to the redeeming equipment bondholders as a class should be ascertained, decreed and distributed.

That is impossible when the bondholders are not in Court and the only record complainant claims his suit is strictly individual.

Upon the theory advanced by Judge TAFT, the Circuit Court in Ohio, upon reversal, would have reinstated on its docket a suit to foreclose the first and second mortgages on property exclusively in that State, and also a suit by Compton, the allowed redemptioner, to obtain the benefit of and enforce by sale the State Court decree.

As has already been stated, the whole Court concurs in deciding that Compton cannot be allowed a decree foreclosing the State Court judgment because his colienors have not been made parties.

If the purchasers' title was overreached by actual redemption payment, the right to possession and future income of the Ohio road would of necessity be determined and on motion the Circuit Court would be constrained to resume permission by a Receiver and hold pending the ultimate foreclosure.

The anomalous complications which would result are within easy forecast.

Instead of reinstating the concurrent and ancillary sequestration which had been for four years conducted

in harmony with the other Circuit Courts in contemplation of a unit sale and title, the whole theory and practical effect of the main foreclosure decree would be revolutionized on the further consideration of a subordinate equity.

Such a redemption would forever prevent any sale thereafter of the Ohio division, except as an isolated and detached property and that too at the foot of an original bill which asked for a unit sale.

The Ohio State Court decree did not adjudge any lien either upon the franchise or any part of the equipment, appurtenances and supplies used indiscriminately upon the whole system or on the income.

What specific portion of the equipment and material now in the purchaser's possession eight years after the sale will the Circuit Court in Ohio on reversal subject to physical recaption and resale?

If the Indiana mortgagees are in truth not parties to the record in the Circuit Court below, upon what tolerable theory can it in their absence authoritatively decide that they have in law no property rights, easements or equities in the Ohio division, or determine as against them, what specific or undivided portion of the several millions total common equipment, material and appurtenances is a part of the Ohio mortgage security and therefore not covered by the Indiana liens?

What proportion of the total earnings received by a single management in one treasury can be well adjudged to constitute the separate earnings of the Ohio railroad? On the assumption that there are in fact no record parties to the suit in the Circuit Court except the two divisional, the consolidated and general mortgagees and Compton, it is impossible for that Court to mold a new decree that would conclude any interest

whereby it would effectively apportion to that road upon resale its proportion of the Receivers' and preferential debt.

Such a provision would be indispensable in any decree authorizing redemption from the foreclosure of the equipment bond decree.

As the absence of Compton's co-lienors was a fatal objection to a resale in the first instance, the objection is equally available to forbid a preliminary redemption, the necessary sequence of which, when accomplished, would be a resale in the same action already decided to be inadmissible.

The consolidated and general mortgages could not quiet their title or extinguish the redemptionary rights of Compton's co-lienors by simply paying him.

They are not in court to have the account stated so as to bind them or to receive the redemption money if tendered, or draw their proper dividend of the surplus remaining on resale after the satisfaction of the two elder mortgages.

They might on being brought in repudiate Compton's election to take satisfaction out of the Ohio division and insist upon a redemption of the Indiana section alone.

When the suggested redemption is subjected to these practical tests it is plainly seen that the proceedings are so defective for want of parties that the Court cannot possibly determine the whole controversy or render any complete or satisfactory decree.

No reversal can be equitably demanded which upsets existing titles only to produce confusion and work inequity.

Third. To allow a separate redemption of the Ohio division as preliminary to its separate sale, would violate the equitable principles which control the marshaling of assets and fix the conditions upon which the discretionary relief of redemption is awarded.

Compton charged in his original Ohio suit that, by force of the consolidation of 1865, the equipment bonds became an equitable lien upon the railroad in Ohio and Indiana. His petition asserted no right or propriety of severance. It pleaded a single lien upon the single debtor road, subject to four mortgages, which were specifically described.

The decree adjudged the lien on the railroad in the two States as broadly as charged. In the foreclosure suit in Indiana he prayed the specific enforcement of that decree as a binding adjudication enforcible against the property there.

While it is conceded that the first and second Indiana mortgagees were in form at least parties to the foreclosure suit in the Circuit Court of Ohio, it is argued in the opinion of Judge TAFT that they are in law to be considered as present only in their capacity as first and second mortgagees upon the Ohio division.

This view is radically inconsistent with the whole theory of the litigation, the course of administration during the four years of Receivership, the scope of the pleadings and the text and principle of the decree itself.

The main foreclosure bill on which the common decree of sale was allowed was filed by trustees of the consolidated mortgage.

It alleged the unity for over twenty years of the corporate organization, ownership, operation and income; that such oneness constituted an important element of value, and that any severance would be hurtful to the public and impair the value of the security to divisional and general creditors.

It also charged that the equipment of the system, valued at several millions of dollars, acquired by the successive consolidated corporations, had never been apportioned specifically to any of the divisions, so that the rights of the several mortgagees thereon could only be charged thereon as an entirety.

In substance the same averment was made as to the non-apportionment of the system earnings as between divisions.

On such allegations it was absolutely indispensable, in order to obtain a uniform decree in each of the Circuit Courts which would effectually conclude all interests wherever situate, that in each court every mortgagee should be a party to the bill not only to set up his lien on the immovable property therein described, but also upon the equipment, franchises and earnings, shared as a common security with other mortgagees and being concurrently administered in all three Circuit Courts by the same Receiver.

In order to secure harmonious judicial action the bills in each of the courts set out the full particulars of every mortgage on any part of the system, made all of them parties, and prayed for the adjudication of all priorities and the sale as a unit of the entire railroad and equipment free of all liens.

As each mortgage without exception claimed a lien of some rank and amount upon the unapportioned equipment, franchise and earnings held in common,

every mortgagee pleaded his encumbrance in each court irrespective of where the particular immovable property described in his security was territorially situate.

Compton's answer in the Circuit Court in Ohio pleaded a common lien adjudged by the State Court decree upon the railroad both in Ohio and Indiana, and specifically admitted the two outstanding Indiana mortgages as pleaded in the bill of the consolidated mortgagees.

He charged in addition that some portion of the common equipment was subject to the lien of the bondholders of his class in preference to the senior mortgages and demanded an accounting between all the divisional mortgagees in all three States, as to the apportionment of equipment and earnings, as essential to a complete decree.

" That there shall be ascertained and determined " just the property upon which each of said several liens " attaches and the respective priorities of such liens.

Judge TAFT says, " The prayer of Compton's pleading ' was confined to Ohio property.' " It was :

" and in all things that the equities of the lienholders " on the portion of said railroad and property situated " in the State of Ohio may be determined *as between* " *themselves and all other parties hereto.*"

It is admitted that a similar pleading was filed by appellant in the Indiana foreclosure suit. There were identical orders of reference, a single Master's report and similar decrees in the Ohio and Indiana suits allowed a redemption as broad as the asserted lien in the two States.

The Indiana mortgagees were therefore necessary parties in the Ohio suit; they were actual parties to the record; they respectively pleaded and that Court specifically adjudicated the amount and rank of every lien upon the system.

Postponing for the present any observations upon the uniform judicial recognition of the substantial unity of such consolidated railway property, even upon the theory that each division of the consolidated railway can be dealt with as a separate estate, the allowance of a separate redemption in Ohio would be a plain violation of two fundamental principles of equity.

(1) To enforce contribution between debtors or estates equally bound for a single charge is a favorite doctrine.

When several parcels of land are charged with the payment of a common debt, each parcel will be compelled in the absence of any controlling intervening equity to ratably contribute to its discharge.

Deering vs. Winchelsea, I. B. & P., 270.
Cooper vs. Stevens, I. John. Ch., 425.
Campbell vs. Meiser, 4 *Ibid.*, 338.
Adams vs. Smith, 50 Vt., 1.
Bonner vs. Maytree, 3 Woods, 738.
McDonald vs. Magruder, 3 Peters, 477.

The equipment bonds were the obligations of the single consolidated company of Ohio and Indiana, contracted on the credit of the equity of redemption in its single road then held in one ownership.

The alleged equitable charge upon its property arose out of a subsequent act of merger with other corporations in 1865.

Upon such facts no equity arises whereby Compton can of right individually require that the Ohio parcel shall constitute either an exclusive or primary fund for payment of the common burden. He has no power to exonerate the Indiana division altogether or convert it in effect into a surety of the Ohio division, liable only on condition of a deficiency.

Appellant holding only one fourth the asserted lien, even if it rests upon two severable estates, has no contract right to alter the relative equal obligations of the two parcels and either doubly charge the Ohio or relieve the Indiana parcel.

In a controversy similar in principle, JESEL, M. R., ruled:

"The advance was one allowance upon the two prop-
"erties as forming together one security. There being
"nothing to make the one security available in priority
"to the other, they should contribute ratably."

Athill vs. Athill, L. R., 16 Ch. Div., 211.

The rule requiring ratable contribution of necessity so controls the remedy as to enforce such equal liability.

Even if the railroad is not, as to Compton, single and indivisible, when the common creditor holds in his hands the unembarrassed right in a single litigation to resort to two estates equally bound for the payment of his debt, equity will so frame his relief as to require him to take ratable satisfaction and will not permit him to abuse equitable process and cast the whole lien upon one portion and in effect release the other.

Allen vs. Clark, 17 Pick., 47.
Barnes vs. Racksher, 1 Y. & C., 401.

"For the same reason the rule embraces purchasers
"in common of an estate bound by a joint lien. As

" between themselves, the purpart of each is liable to
" contribute only its proportion towards the discharge
" of the common burden and beyond this is to be re-
" garded simply as the surety of the remaining pur-
" parts."

McLaughlin vs. Curtis, 27 Wis., 644.

The majority of the equipment bonds are not in Court and would not be concluded by any such arbitrary dealing with the joint security by a minority interest. They cannot be compelled to divide their debt or security or be estopped by Compton's election to resort to the Ohio division for primary satisfaction.

In a litigation, where the Indiana mortgagees are actual parties and all their equities are capable of assertion and protection, to allow a partial redemption as preliminary to a separate resale of the Ohio road to accomplish the full satisfaction of the equipment bond debt out of that part of the total security, amounts to an inequitable enlargement of the obligation of that parcel.

" The rules never assume to take from a prior en-
" cumbrancer any substantial right; their purpose is
" to enforce his just right in such order of priority as
" without loss to himself will protect, as far as may be
" practicable, the subsequently acquired interest of
" others."

Sibley vs. Baker, 23 Mich., 312.

In pleading and asking enforcement of the State Court decree appellant defined it as an adjudication " that the said equipment bonds constituted an equi-
" table lien and charge upon all the said railroad in
" the States of Ohio and Indiana."

The decree under appeal allowed equal remedy against the whole property covered by the asserted lien and

was framed so as give proper effect to the rule of ratable contribution by ordering the entire security to sale.

If general equitable principles are to control the controversy, there is no merit whatever in the demand that such a common enforcement decree should be now reversed and a new one substituted, which, contrary to the facts and the fundamental equities arising thereon, should deal with the Ohio division as though it was a separately charged estate.

(2) Equity will not permit any hurtful partial redemption when the mortgagee holds other liens which are confessedly prior to the lien of the claim seeking redemption.

It is conceded that the railroad company, as purchaser under the general foreclosure decree, is subrogated to all creditor rights of the first and second Ohio mortgages.

One of the Judges denies that the first and second Indiana mortgagees were parties in the Circuit Court in Ohio, or that their liens were adjudged therein, or that the unit purchaser can on this appeal assert any of the equities specially belonging to the Indiana division bonds and mortgages.

It has already been shown that such a restricted theory of the record is incorrect in fact and untenable in law. As Compton's own answer in Ohio directly impleaded the Indiana mortgagees, and expressly demanded that the Circuit Court in Ohio should adjudge their liens and priorities, as well as those of the Ohio division mortgagees, he is precluded from now asserting that those mortgagees were not in Court, and their liens actually and conclusively adjudged and enforced.

Indeed, in another part of his opinion, Judge TAFT concedes: "The proposed decree for sale fixed the "amount due on and the priority of every mortgage set "up in the cause" (Certif., p. 29).

The purchaser, therefore, is on this appeal to be dealt with as the equitable assignee of the liens and debts of the two Indiana divisional mortgages.

It is also the actual holder of such liens.

In discussing adversely the doctrine that the four mortgages in the two States should be dealt with as a consolidated single debt, from which no partial redemption should be allowed, it is stated there is no evidence to show that the bondholders under one mortgage are the same as the bondholders under the other, and, "therefore, the real parties in interest in "the two mortgages are not the same; and, therefore, "even the strict and inequitable rule with reference "to tacking mortgages in England would not apply in "such a case" (Certif. p. 41).

The same opinion elsewhere destroys this view when it speaks of the purchase as made by a committee "rep-"resenting nearly all the bonds, with a plan of reor-"ganization, in which all bonds of every class would "be represented," &c. (Certif., p. 29).

The statement of facts shows that

"The purchasers had on deposit a large number of "the bonds under all the mortgages which were "accepted on the bids," and also "the purchasing "committee of reorganizing bondholders had, we may "infer from the schedule of bonds afterwards deposited "by them, as well as from their purchase of the road "under the previous foreclosure, bonds of every class "to enable them safely to make bids of large amounts "and to protect the interests of those they represented" (Certif., pp. 10, 29).

The principle of consolidation of securities cannot, therefore, be avoided on the mistaken theory that the Indiana first and second mortgage bonds were actually held in different ownership from the Ohio division bonds.

The record is conclusive that there was a substantial union of both issues in the hands of the purchasers.

It is of importance in this connection to note the findings in the decree that all four of the senior Ohio and Indiana mortgages matured in 1865 and 1878, and were then assumed and extended as personal obligations of the consolidated corporation. Also, that the second mortgages in Ohio and Indiana had a common source of title. A mortgage covering the consolidated road in both States was executed in 1856 and foreclosed in 1858. The entire road was sold to the same purchaser, who organized two nominally separate companies, which executed the two second mortgages and at once reconsolidated.

It has become a settled principle of English equity procedure regulating the exercise of redemption rights that if the mortgagor pledges two estates, although to different persons and for different debts, if such debts become united in the same creditor, the law will not grant a separate redemption of one estate, especially if such relief would injuriously affect the parcel unredeemed.

Selby vs. Pomfret, 1 J. & H., 339.
Vint vs. Padget, 2 DeG. & J., 611.
Watts vs. Symes, 1 DeG., M. & G., 240.
Wells vs. Tucker, 57 Vt., 223.

This principle does not rest upon the harsh rule allowing the tacking of mortgages whereby an inter-

mediate lien is forced to pay off a junior, but upon the cardinal maxim that he who asks must submit to equity.

Fisher on Mortg., Sec. 786.

Appellant's debt was contracted upon the credit of the entire road in both States as it then stood encumbered.

There is no hardship in requiring the payment in full of the four mortgages because they are all senior in date and lien to the appellant's rights and are concentrated in single ownership.

There is obvious and gross injustice in allowing him to redeem a selected part of his security to the depreciation and continuing injury of the same senior mortgagees upon the remainder.

Fourth. The peculiar nature of railway property and the public duties with which it is charged forbid any unnecessary or injurious severance of a railroad which has been owned and operated by a lawfully consolidated corporation as a single highway for a period exceeding that which vests prescriptive right.

The remedies of all creditors accruing after such consolidation must be enforced against the property in its entirety.

The conclusion that the Ohio and Indiana divisions of the consolidated railroad were "separate and separable estates" deals with the property as though it was governed by the same legal principles applicable to the

alienation, encumbrance and judicial sale of ordinary realty.

Such analogy violates all the precedents bearing on the subject.

Without citing authorities which have become elementary, it will suffice to say that railway property is so exceptional that it is not subject to alienation, lease or encumbrance as incident to mere ownership.

Its undertaking cannot be seized or sold under execution at law. It is not within the purview of statutes allowing redemption of real estate from judicial sales. Even paramount title cannot eject from a part of the roadway after public rights have attached.

The exceptional preference awarded to necessary operating debts over contract liens is allowed against an insolvent railroad solely because such a quasi-public work is to be judicially dealt with on principles and considerations essentially variant from those governing remedies against debtor farms or city lots.

It can properly be assumed that Ohio enacted legislation authorizing its domestic railway companies to consolidate with the companies of adjoining States, because the union of the roads so as "to form a continuous line for the passage of cars" operated to promote the public interest and would enlarge the revenues and enhance the property values of the merging companies.

As a practical question no one can dispute but what the earning power and commercial value of the resultant unit exceeds what could be realized from the separate operation or sale of the divided constituents.

This forces the acceptance of the conclusion that a severance of a beneficial union thus authorized and encouraged by the State, not only creates a disability to discharge the broader public service, but necessarily

occasions disturbance of settled trade conditions, shrinkage in revenues, increase of operating charges and serious impairment of property values as represented by stocks and bonds.

The Ohio Statute, Sec. 3382, declares that upon filing the perfected agreement of consolidation

" the several companies parties thereto shall be deemed
" and taken to be one company,"

and by Sec. 3384, on the election of the first Board of Directors, all the rights, franchises and property of each of the merging companies,

" shall be deemed to be transferred to and vested in
" such new company without further act or deed."

It cannot be asserted that the new relation which the roads assumed to each other was not to be permanent and indissoluble.

The statute provides no contingency on which or method by which the absolute merger accomplished by force of law can be thereafter determined.

As has been ruled, the original companies by the act of consolidation surrender their own franchise and existence, and a new corporation comes into life endowed with new franchises of its own by direct grant from the State.

K. & W. R. R. vs. Missouri, 150 U. S., 301.

By a fiction, restricted solely to the assertion of remedies by subsisting creditors,

"the respective companies may be deemed to be in
" existence to 'preserve' such rights and liens."

As against any creditor in subsequent contract privity directly with the new consolidated company, the union of stock, property and capacity is absolute and in-

violable, and his remedy must in consequence be given effect against a single debtor owning a single property.

There is certainly no provision of the statute which affords the slightest support to the contention that a creditor coming in after such a consolidation could so prosecute his demand as to disrupt the precedent union and bring to separate sale an integral portion of the one property to the obvious injury of the remainder.

Any specific contract lien on a portion of the road would be accepted with full statutory notice that the remedy thereon must be awarded in subordination to the superior right of the public and all creditors to the continued operation of the whole road as a single highway.

The Courts, State and Federal, have uniformely enforced the principle of non-severance.
even against those holding express liens upon the original roads executed prior to the consolidation.

The practice of requiring at least an ultimate offer of consolidated railway property to be made as a single parcel, as approved in Muller vs. Dows, 94 U. S., 449; Union Trust Co. vs. Mid. Ry., 117 *Ibid.*, 466, and Bank vs. Shedd, 121 U. S., 87, has been uniformly followed in the Circuit Courts.

The case last quoted is a forcible illustration of the principle of equitable conversion as applied to sustain the practical and effective unity of railway property when consolidated under legislative authority.

There were separate mortgages on the roads of separate companies which were afterwards consolidated.

This Court denied a separate foreclosure to the separate mortgagee, according to the strict text of his contract lien, and set at rest the right of the circuit

courts to deal with the aggregate railway as a single parcel, and to remit lien creditors to the sale proceeds of the entirety.

If there was no error to refuse such a separate sale on the application of an original divisional mortgagee, what possible standing has Compton, who claims a single charge upon the entity created by consolidation, to exact a partial foreclosure of his lien, and dismember the property against the resistance of the senior mortgagees.

The judicial power to charge the separate liens upon the fund in gross has its analogy in the well-attested doctrine whereby the floating mortgage lien executed by a tenant in common upon his undivided interest, is fastened upon the specific parcel which is set apart to him in the partition.

It is common knowledge that the unit bid for such properties always exceeds the aggregate of the parcel bids.

The obvious judicial duty is to sell such property without severance, because its highest value cannot be realized by any other method.

Pepper vs. Shepherd, 133 U. S., 626.

Lord CAIRNS, in discussing this subject, held in strong words that all parts of such property were necessary to the continued existence and beneficial operation of the company; that the Court's decree deals with the completed undertaking as it is operated and not the ingredients.

He speaks of such property as " a thing complete, a go-
" ing concern with internal and parliamentary powers of
" management not to be interfered with; a fruit-bearing

" tree, the produce of which is the fund dedicated by
" the contract to secure and pay the debt."

In re L. C. & Dover Ry., L. R. 5 Ch., 318.

The Supreme Court of Indiana has authoritatively settled the rule of property in that State in accord with the practice approved by this Court.

" The right to enforce the lien necessarily requires a
" sale of the whole road, since it cannot be sold in
" fragments."

" The public have a right to have a railroad remain
" an entirety, and it would be destructive to public in-
" terest to permit it to be broken up into disjointed
" and practically useless fragments."

F. L. & T. Co. vs. Can. & St. L. R. R., 127 Ind., 250.

The principle has been forcibly discussed in two recent Ohio cases, which are not cited in the opinions.

Two railroad companies were tenants in common of a single road between Columbus and Newark. One sued to force a partition or sale.

It was decided that such a division would disable the performance of the public duties and the ordinary right of tenants in common to partition was not applicable to such property.

" The common estate thus created, however, is held
" by the owners for the sole use of maintaining and
" operating a railroad as a public highway, without any
" power in either or both the owners to sell the same
" or any part thereof."

" In the solution of this question, the effects and
" consequences of a sale may be considered. The gen-
" eral policy of the State has been to withhold from
" railroad companies the power to sell their roads."

" The intention was a perpetual ownership in com-
" mon, especially as the power of alienation was with-
" held from the tenants in commons.

" All its powers and duties are prescribed by statu-
" tory law. As well its power to dispose of as to
" acquire property. Neither of the parties to this suit
" has power to sell and convey for any purpose its
" interest in the subject matter of the suit."

" It was the use of an undivided road, not the half
" of the road when divided, that was thus secured to
" the vendor, and this not for a time limited to the
" pleasure of the purchaser, but for all time.

" Our conclusion therefore is that the provisions of
" this statute, when considered in connection with the
" fact that power of alienation was withheld from
" these co-tenants, is inconsistent with the absolute
" right to demand or compel partition, whereby the
" usefulness of a part of this section of the road to the
" successor of the Central Ohio Railroad Co. would
" undeniably be impaired."

P., C. & St. L. R. R. vs. Cent. Ohio, 38 Ohio S., 614.

In Stewart vs. W. & L. E. Ry., 53 Ohio S 152, the same Court again had under consideration the question whether a creditor could force to sale a portion of a railroad.

It approved its previous holding that " a sale of the
" whole line is the only mode in which the rights and
" interests of other parties either as owners or lien
" holders upon the road can be protected and their
" property or security saved from absolute destruc-
" tion."

It also ruled that the creditor cannot sell on execution the property to which his lien attaches separate from the franchise.

" When it is part only of the corporate property and
" is necessary in connection with the balance of

" the property to enable the company to accomplish
' the purposes of its organization and perform the
" duties it owes the public, or its sale will materially
" impair the uses and values of the balance of the
" property, *he may by a proceeding in equity, to which*
" *all persons interested are made parties, enforce his lien*
" *by subjecting the whole of the property and franchises*
" *of the corporation to sale.*"

This decision settles beyond debate that the public policy of Ohio peremptorily forbids the programme of partial redemption and separate sale of one division of a consolidated railroad and disables the Courts from awarding any such relief.

The opinion favoring such course calls attention to the offers by divisions in the main decree, as though that constituted a precedent for the partial redemption.

There is, in fact, no similarity.

The separate offers were provisional only, to approximately ascertain the respective shares of the unit bid which should be apportioned to divisions.

Such offers were made to correspond with the express contract liens on independent roads prior to consolidation.

If the equipment bonds had been in fact secured by an express mortgage on the obligors' road in Indiana and Ohio, the decree would then without doubt have contained a provision requiring the Masters, after the Ohio and Indiana divisions had been separately offered, to then offer those two divisions together, as being the identical property covered by the supposed mortgage securing the equipment bonds.

This method would have fixed the value of that consolidated debtor's entire road, and the equipment bondholders would have been remitted to the surplus

of that bid remaining after full payment of the four Ohio and Indiana mortgages.

This is precisely the theory and result of the general redemption decree allowed by Judges JACKSON and GRESHAM which has been rejected by appellant.

He has no debt or contract lien separately charging the Ohio road.

What he desires is to take a part of the property out of the system, so that there can never, by any possibility, be anything sold but a disconnected section of a railroad; to split his interstate claim, which is subordinate in time, lien and equity to both the Indiana mortgages, and force them to ransom their endangered interests by redeeming a junior encumbrance.

The case does not exist which, properly construed, lends the slightest support to such an injurious redemption or resale.

Fifth. The proposed redemption and resale of the Ohio division for account of equipment bondholders would be a gross violation of the superior rights and equities of the Indiana mortgages in and against both the rolling stock and realty covered by the Ohio mortgages.

The discussion in the opinion favoring such redemption right of the equipment bonds proceeds throughout upon the assumption that the mortgages on the two divisions cover two entirely distinct and separate properties and that the securities did not in any respect cross the State boundary line or jointly cover any common property.

From this premise the sequence was deduced that the equipment bonds held a lien next in rank to the Ohio mortgages upon all the property they covered and was therefore entitled to redeem and come against the entire surplus. It has already been argued that this conclusion was plainly erroneous.

The State Court decree did not adjudge any charge or right of sale to the equipment bonds against the franchise, equipment or earnings of either division, but only upon the mere roadway and fixtures.

As to a valuable and material portion of the property covered by the Ohio mortgages appellant has, in fact, no semblance of lien.

His right to redeem must be vindicated upon the ground that he and his class hold a junior lien upon a part only of the Ohio mortgage security.

It cannot be denied but what the Indiana division bondholders held a lien in common with the Ohio mortgages upon the unapportioned rolling stock, the common franchises and income.

The sale decree expressly so adjudicates, and at this bar such finding is conclusive.

If the rights of the Indiana bondholders extended no further, the situation would be that their right to protect their interests by redeeming the two Ohio mortgages, if unforeclosed, because they covered, in a substantial degree, the same property, would be superior to the redemptionary right of appellant and all other equipment bondholders.

The equity of Indiana mortgages to thus protect their share in a common security accrued in 1853 and 1858, when the encumbrances became a lien on the mingled and undistributed equipment and income charged in common by the two sets of divisional bonds.

The right to redeem could not accrue to the equipment bonds until the merger in 1865.

When equities are equal that which is prior in time must prevail.

On this view it is plain that the Indiana bonds, if the *status quo* was restored, would have the elder and better equity and the first right to redeem both the Ohio mortgages, be subrogated and hold them together with the Indiana mortgage debt as a consolidated single security, covering the entire road and equipment in both States and only to be redeemed against as an entirety.

Twombly vs. Cassidy, 82 N. Y., 155.
Memphis R. R. vs. Dow, 120 U. S., 287.

That is in substance the present position of the purchasing company. It holds, by direct ownership and subrogation through the foreclosure purchase, the bonds secured by all four mortgages.

To protect the unquestionable older equity the Court can properly deal with the transaction in that respect as a redemption of the Ohio by the Indiana mortgages, leaving the general third rank lien no other remedy but to redeem the mortgages upon both divisions.

To defeat the suggested redemption it is immaterial whether the theory of Judge TAFT that the Indiana mortgagees were not in Court is or is not sound.

Even if they are not parties their absence is fatal to the proposed relief to appellant.

The Court will award no redemption which the record shows would impair or annul the superior rights of an interest not in Court.

The right of redemption can only be awarded in the due order of priority.

Haines vs. Beach, 3 Johns. Ch., 459.

Moore vs. Beasom, 44 N. H., 215.
Titley vs. Davis, 2 Y. & C., 293.
Seton on Decrees, 509.

It is further submitted that the theory that the Indiana mortgages have no rights or equities in and against the Ohio division railroad itself is radically unsound.

The mortgages were similar. Each conveyed as security the road made and to be made, right of way, tracks, rights, privileges, franchises, increase, accessions and incidents (Certif., p. 12).

This language is construed to cover "the railroad "and any subsequent accessions or accretions properly "appurtenant thereto, acquired either by itself or any "successor in title, whether the road be then main- "tained by virtue of the original franchise or of fran- "chises newly acquired from the State" (Opinion, p. 27).

The inquiry arises whether the merger of 1858 had any effect upon or added anything to the security theretofore covered by the Indiana mortgages.

By force of the Statute of Consolidation the franchises exclusively domestic to Indiana were surrendered, and broader capacities were granted by the two States. The Indiana company took privileges and became domesticated in Ohio. Whatever new privileges or added property rights it thereby acquired passed under the mortgage by the operation of the after-acquired property clause, and fed the bondholders' security.

Whatever is acquired under the exercise of the franchise becomes an accession to the mortgaged undertaking.

Such a covenant embraces, not only legal acquisitions,

but also all equitable rights and interests subsequently acquired, either by or for the railroad company.

Wade vs. Chi. & Spring R. R., 149 U. S., 327.

Thompson vs. W. W. Valley R. R., 132 *Ibid.*, 68.

Cent. Trust Co. vs. Kneeland, 138 *Ibid.*, 414.

The purchase or lease of another road fastens the mortgage thereon as an appurtenance to the principal thing granted.

Jesup vs. Branch, 106 U. S., 468.

Barnard vs. N. & W. R. R., 4 Cliff., 351.

The laws of Ohio would undoubtedly have authorized the Indiana company, even as it separately existed before 1858, to have held, operated and enjoyed a railroad in Ohio by either one of three methods:

(1) By constructing an extension of its own road from the Indiana boundary line to Toledo.

Ohio Stat., Sec. 3399.

State vs. Sherman, 22 Ohio S., 411.

(2) Under Sec. 3300 it could have bought the Ohio division and taken title to the Indiana Company.

(3) By authority of the same section it could have either leased the exclusive user of such Ohio division or contracted for independent trackage right thereon, to move its own trains between its eastern terminus at the boundary line and Toledo.

If the contract relations had been of either class there could not be any question but what the Ohio division thus built, bought or leased, would have been acquired under the Indiana company's franchise, and as an accession and appurtenance acquired to use in connection with the mortgaged road would have been

directly covered by the two Indiana mortgages, subject, of course, to the two Ohio division mortgages by which it was encumbered when bought or leased.

How then can the proposition be maintained that the merger contract between the Indiana and Ohio Companies in 1858 did not add valuable property rights to each mortgage security? By that act each company enlarged its facilities as a carrier. Each road became possessed of the contract and statutory right to issue through bills, move continuous trains, and in every respect have the concurrent and equal user and enjoyment of the road, facilities and terminals of the other, as fully as though the two consolidating companies were tenants in common of the whole.

The legal effect of such a statutory union is not a mere alliance, but an indissoluble contract by which each road obtains permanent and interchangeable rights over the other.

Gt. North. Ry. vs. M., S. & Lin. Ry., 5 D., G. & S., 139.

The new company resulting from the consolidation stood as successor to the Indiana mortgagor. It thenceforth had a "right of way" in Ohio free for the movement of the Indiana division trains, and "rights" "privileges" and "accessions" which were from that date covered by the Indiana mortgages.

The conclusion would seem to be inevitable that the Indiana mortgages became in law substantive liens upon the Ohio division and the Ohio mortgages on the Indiana division.

If they did not become in law express charges upon the division, the statute of consolidation carries no real meaning if the union did not, *per se*, import such

perpetual covenants with regard to the new and permanent method of operating the two roads as one, as to create mutual easements and equitable servitudes and to perpetuate its user as an unbroken and continuous road.

Such was the obvious and continuous duty it owed to the two States which endowed it with existence and capacity for that distinct purpose.

That duty could have been enforced by mandamus.

U. P. R. R. vs. Hall, 91 U. S., 343.

If this lesser conclusion be sound it effectually disposes of the suggestion that, notwithstanding the act of merger, the new company owed to the Indiana bondholders no duty of maintaining the continuity of its line, but could have lawfully aliened the Ohio division and severed the traffic connection and ceased any exchange.

The new corporation possessed no capacity to practically defeat the main purpose of the union.

The Indiana road had at least a permanent easement for its trains and traffic over the Ohio division, and that accession constituted a valuable ingredient of the mortgage security belonging to the Indiana bondholders.

They could have appealed to equity to protect their lien if threatened by the withdrawal of that easement, by injunction to force the servient estate to specifically perform its covenants and allow its line to be continuously used as by the contract and law of consolidation it promised to use it.

Joy vs. St. Louis, 138 U. S., 1.
R. I. R. R., vs. R. G. R. R., 143 *Ibid.*, 596.
U. P. Ry. vs. C., R. I. & P. R., 163 *Ibid.*, 564.

If the considerations upon this point are in either respect sound the Indiana mortgages became clothed in 1858 with specific easements or equities directly against the Ohio division which effectually prevent any severance of the divisions or disruption of their statutory relation to each other, either by redemption or otherwise, at the suit of a subsequent creditor.

II.

If Compton is not able as an original proposition to vindicate his right to separate redemption and resale of the Ohio division, the inquiry remains whether either the State Court recovery or the saving clause in the foreclosure decree have somehow foreclosed the issue in his favor.

Sixth. The judgment rendered by the Supreme Court of Ohio does not constitute a conclusive appropriation of the Ohio division to the satisfaction of the equipment bonds, and the relief therein awarded by way of execution, is not binding upon the senior mortgagees or the Court holding the property in prior custody.

(1) Neither of the four divisional mortgagees were parties to the suit brought by Compton. As to them his recovery is *res inter alios acta*. It is not available

as an adjudication against them or the purchasers, so far as they are clothed with the mortgagees' rights.

Keokuk & W. Ry. vs. Missouri, 152 U. S., 301.

It is a travesty upon judicial proceedings if, upon a contention so vital to the Indiana mortgage security as the lopping off of their only outlet, those bondholders were absolutely barred by a litigation when they had no opportunity to be heard.

(2) The opinion of Judge Taft and the appellant's brief seek by elaborate argument to maintain that the clause of the decree of the State Court which after a short day for payment directs that "an order of sale issue for the sale as upon execution at law" of all the railroad, &c., "which is situated in the State of Ohio and the jurisdiction of this Court," is not mere process, but is an essential part of the adjudication and is conclusive on the parties.

The learned Circuit Court Judge, in order to preserve the consistency of the theory, must therefore concede, on the principle of inclusion and exclusion, that the Supreme Court of Ohio, by restricting the sale to the Ohio division, conclusively decided against the right of the equipment bondholders to sell the Indiana division at all, and, in effect, accomplished its release.

How any such release would bind the other three-quarters interest is not disclosed.

In the determined effort to seize the Ohio division, at all events, the appellant's brief adopts this precise view and apparently abandons any claim on the Indiana division:

"The lien of Compton's decree is on the Ohio prop-
"erty alone, and all proceedings to enforce it by sale,

" redemption, or otherwise must be limited to that " property " (Brief, p. 45).

" It became then just what it would have been if the " owner had given him a separate mortgage on the " ~~entire~~ Ohio property alone for his entire lien " (Brief, p. 30).

All this is radically inconsistent with his previous attitude in the cause, and is a mere afterthought.

If a binding adjudication restricted him to the Ohio property, on what theory did he appear in the Indiana suit and plead and ask the specific enforcement of the Ohio decree by sale of the road in Indiana?

It is said the Federal forum owes the appellant substantially the same remedy he could have obtained by prosecuting the State Court suit, and there are " reasons of peculiar force for not abridging in the " slightest degree the rights adjudged to be his in the " Ohio decree " (Certif., p. 34).

If the order restricting the sale on execution to the property in Ohio is in law an essential part of the adjudication, there are several other equally important provisions in the same clause of the judgment which by like logic are also *res judicata* against Compton.

The only sale authorized thereunder was a sale of the mere equity, and not of the full title, or to pay liens in the order of priority.

Any sale was forbidden except for a sum not less than the full value as appraised by ~~those~~ three freeholders.

The entire cash proceeds less costs were to be brought into court, and in such fund his interest was adjudged to be one-quarter.

The appellant occupies a double and inconsistent position on the legal proposition, while he invokes the principle of *res judicata* against absent interests, in so far as the order for process is concerned, he seeks to

emancipate himself from all the other conditions of the State Court decree.

He now affirms it thereby confines his lien and remedy to Ohio property. He sued both below and in Indiana to enforce it in that State.

He demands the sale of the full title instead of the equity; a decree which shall release him from the bar of the alleged adjudication that the property must bring not less than its full appraised value, and, finally, that the avails of the entire security shall be awarded exclusively to him.

In all these respects he seeks to avoid the effect of his own recovery.

It is evident that he was unable to obtain any practical result from the attempt to execute his own recovery. He, in effect, abandoned it, and came into the Federal Court, not to obtain the same relief adjudged to him, but substantially variant, claiming upon new averments against new parties, priorities upon equipment, terminals and earnings not alluded to in the State Court proceeding.

He was not only under changed conditions, asking equity to piece out and give effect to a defective decree, but, in essential particulars, to relieve him from the restrictions of his own recovery.

Under such circumstances the Court which is called upon to give effect to such defective decree is not in any way bound to adopt the special relief granted by the original decree.

It is admitted that there was no issue in the State Court suit involving the question of severance.

It is also clear that, as there was then no default upon any of the mortgages, that the remedy was to the judicial mind directed solely against the owner, and in

no respect were the rights of the divisional mortgages under consideration. The pleadings involved no question of possession or severance between the senior mortgagees not in court.

The decree should be interpreted consistently with the pleadings, and in that view the order for process has no more the quality of an effective adjudication confining the sale and satisfaction to the Ohio division than a general order to issue execution at the foot of a judgment at law.

Appellant, however, contends that the entry of the State Court decree in 1888 brought into existence "a "new and independent right of Compton. What had "been a mere floating equity on undefined property "in two States became a debt and lien on specific "property in Ohio only" (Brief, p. 30).

The foreclosure suit was brought in 1886.

Compton was not then a recorded or contract lienor.

This Court had decided that the class of which he was a member was not entitled to any lien and had been cut off by an intervening foreclosure.

As the holder of an unadjudicated floating equity, a latent equity not discoverable from the public records, he was neither a necessary or proper party to the foreclosure suit.

If after the commencement of the suit Compton did upon the new theory of his counsel become vested by decree with a new and independent right and equitable charge upon Ohio realty, his recovery is precisely like any other lien obtained *pendente lite*, and is subordinate in every respect to the proceedings and decree in the foreclosure suit.

Comer vs. Dodson, 22 Ohio S., 615.
Cradelbaugh vs. Pritchett, 8 *Ibid.*, 646.

Eyster vs. Gaff, 91 U. S., 521.
Stout vs. Lye, 103 *Ibid.*, 66.

The precise question has been recently decided in an Ohio case already cited on another point.

"A suit brought in a federal court to foreclose a "mortgage on the property of a railroad corporation "operates as constructive notice throughout the dis- "trict and all persons acquiring an interest in or lien "on any part of the property during the pendency of "the suit will be bound by the decree and sale made "thereunder; the purchaser will take the property dis- "charged from all such liens and interests, though the "persons obtaining them be not parties to the suit "they must seek satisfaction from the proceeds of the "sale to reach which they should become parties and "bring their claims to the attention of the Court by "appropriate proceedings."

"It follows that the judgments recovered against the "defendant railroad company while the suit was pend- "ing in the Federal Court to foreclose the mortgage "embracing the property which it is sought to subject "to their payment, created no lien nor gave any right "or remedy to these creditors that can now be en- "forced or made effectual against the property."

Stewart vs. Wheel. & L. E., 53 Ohio S., 152.
Union Trust Co. vs. In. N. Co., 130 U. S., 565.
Mellin vs. Moline Iron Co., 131 *ibid.*, 352.

If his own contention be conceded, Compton is not only setting up new and independent equity accruing to him pending the foreclosure suit, but also while the property involved was in the actual custody of the Federal Courts, both for general administration, foreclosure and sale of the whole title.

It is elementary that such custody necessarily excluded the power of any other Court either to sell

property or conclusively adjudge the title to or liens upon, or method of sale of any portion of the property thus in *custodia legis*.

Byers vs. McAuley, 149 U. S., 608.

This consideration effectually disposes of the claim that the decree of a State Court rendered while the property affected was being held and administered by the Circuit Court constituted an indisputable appropriation of the *res* in another judicial custody. On the contrary, the adjudication of the State Court was absolutely nugatory upon the rights of any of the parties in interest, or the Court having the railroad in actual custody.

Its plenary jurisdiction to determine whether the railroad should be sold as a unit or by divisions remained entirely unaffected by the State Court decree, granting an order for the sale of the Ohio division.

It was under no obligation to notice or yield any obedience to it.

Seventh.

~~Sixth~~. The saving clause in the general foreclosure decree simply reserved the appellant's claim without prejudice. It did not enlarge or advance his equity or guarantee to him the sale of the Ohio division separated from the system.

The effort is made to fasten such a construction upon the saving clause as would bind the Court to a method of sale which otherwise would not have been consistent with equity practice.

It cannot be pretended that the clause in terms or by fair intendment committed the Court either to separately seize or resell the Ohio division.

That reservation cannot be fairly interpreted unless it be in harmony with the fact that the judicial administration and sale of the railroad was concurrent and identical in the several courts.

Compton intervened both in Indiana and Ohio. There was the same reservation in each court. Each must receive precisely the same construction as the other.

If the contingency of nonpayment of the Compton decree should occur, each Court was under precisely the same obligation as the other to resume possession and grant supplemental relief.

That obligation was "to resume possession of the "property covered and affected by the said lien of the "defendant James Compton, and enforce such decree, "as it may render herein in his favor, by a resale of "such property, or otherwise, as this Court may di-"rect."

"The property covered and affected by the said lien" was not restricted to the Ohio division. The pleadings on file showed the claim to be of a unit lien in both States.

To construe the reservation to bind the Court to reseize and resell only the Ohio division would render the like saving clause in Indiana absurd and nugatory.

On the contingency of nonpayment the only tolerable meaning of the two decrees construed together was that the two Courts, again acting concurrently, would grant such common relief in the two States in respect to the whole lien as would be consistent with equity.

Read together there is nothing in the two reservations, both of which were inserted on the insistence of Compton, which lends the slightest support to the

interpretation that he could discriminate between the Courts as to their future action under the common reservation and assert that there was an absolute judicial commitment of the Circuit Court in Ohio to reseize that property separate from the Indiana division, or allow its isolation under any theory of separate redemption or resale.

The two reservations contemplated nothing but joint future action of both Courts or neither.

The decree of the two Courts allowing full redemption was more than a full compliance with the joint judicial obligation owed to Compton under the saving clause.

For these reasons this Court should instruct the Circuit Court of Appeals that the Circuit Court in Ohio was under no judicial obligation to separate itself from the Circuit Court in Indiana, or allow appellant to separately redeem the Ohio division by the payment of the two mortgages thereon.

HENRY CRAWFORD,
Solicitor.

Supreme Court, U. S.
FILED
DEC 19 1896
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL., APPELLEES.

REPLY TO ADDITIONAL BRIEF FOR APPELLEES.

JOHN H. DOYLE,
JOHN G. MILBURN,
JUDSON HARMON,
For Appellant.

DECEMBER, 1896.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 314.

JAMES COMPTON, APPELLANT,

vs.

JAMES R. JESUP AND EDWARD H. DIXON, TRUSTEES, ET AL., APPELLEES.

REPLY TO ADDITIONAL BRIEF FOR APPELLEES.

Our reason for troubling the Court with another brief is, as stated during the argument, that a new brief was filed by appellees on the day of that argument, which we had not seen before and which contained many statements of fact to which we could not assent and arguments based thereon which we deemed inapplicable.

1.

We wish to emphasize the statement that we did not intervene in this suit; we did not voluntarily come into it and ask anything; we did not file any cross-bill. We did

not interplead any parties, did not ask for process against any parties, and did not pray for any affirmative decree.

The amended and supplemental bills and cross-bills filed against Compton set up the suit commenced by David J. Tysen in the Indiana courts, afterwards known as the Ham suit; the decree by the circuit court of Indiana in that suit; the appeal to this Court and the decision therein; the commencement in 1880 in the court of common pleas of Lucas county, Ohio, of the Compton suit; the decree of that court in March, 1882, in Compton's favor; the appeal therefrom, and the final decree of the Supreme Court in Compton's favor, and that Compton was about to enforce that decree by process from the State court; that Compton had become a *quasi* party to the Ham suit and hence was barred from enforcing his Ohio decree, and prayed as follows:

"Your orators therefore pray that the said James Compton and the said The Metropolitan National Bank may be cited and required to appear and answer the premises fully; that the said James Compton, his solicitors, attorneys, agents, and all other persons, may during the pendency of this cause be restrained and enjoined from making or attempting to make any sale of the railroads, property, appurtenances, and franchises aforesaid or any part thereof under or by virtue of any decree in the action so instituted by him; that the said decree of the said circuit court of the United States for the district of Indiana, entered upon the mandate of the Supreme Court of the United States in the action instituted by the said David J. Tysen, may be decreed and adjudged to be an absolute and final determination of the controversy as to the alleged equitable lien or charge created by the said equipment bonds, and that the said James Compton was privy thereto and is bound thereby; that the decree obtained by the said Compton in the action instituted by him in the court of common pleas in and for Lucas county, Ohio, may be declared void and of no effect, and that the said James Compton may be perpetually enjoined and restrained from taking any action or proceeding or claiming any right whatever under the said decree, or making or attempting to make any sale of the said property

thereunder, and from taking any action to enforce or claim any equitable lien or charge upon any of the said railroads or property for or by reason of or arising from any alleged ownership of such equipment bonds as aforesaid."

Affidavits for service on Compton were filed, and he was served under section 8 of the act of 1875. He moved to set aside the service. His motion was denied. Then he demurred, claiming, among other things, that this attempt to restrain or enjoin the enforcement of his Ohio decree could not be maintained. His demurrer was overruled, and he was given leave to answer by a date named. Before that time expired the decree of sale was entered with the reservations in his favor. Compton answered the bill and amended and supplemental bill making him a party by setting up his decree in the State court. He attached and filed with his answer an exemplified transcript of the record in his suit in the State court. He denied that he had in any manner become a party to the Ham suit or had any interest therein. He averred that when he commenced his suit in February, 1880, in the State court in Ohio the Tysen (Ham) suit had been dismissed; that prior thereto no claim had ever been made in that suit of any lien growing out of the consolidation agreements or the statutes on that subject, but that after he had commenced his suit in Ohio one Ham went into the Tysen suit at a subsequent term to the one in which it had been dismissed, had the case redocketed, and then for the first time by new pleadings set up the lien under the consolidation agreement; and having fully answered he prayed, and this is his only prayer:

"And this defendant avers that the railroad and other property in the State of Ohio upon which the lien of this defendant exists, as before stated, ought not in equity to be sold in connection with or as a part of any entire or connected system of railroad; that the liens existing upon the Ohio division of the said railroad are entitled to a separate and distinct sale thereof for the payment of the same, if not

paid by the defendants or any of them; and this defendant insists upon and prays the court that in such order and decree as may be rendered herein the same will properly and equitably settle the priority of liens upon all of said Ohio property as between this defendant and said two mortgages, the one to cross-complainant and the other to said Edwin D. Morgan, trustee, the amount due said division for earnings used for any purpose, for interest, operating expenses, repairs, betterments, or otherwise, on any other division or property; the amount of rolling stock and equipment properly applicable to the said Ohio division and the value thereof, and in all things that the equities of the lienholders on said Ohio division or property may be determined as between themselves and all other parties hereto, and that said property, if sold under any decree herein, may be subjected to separate sale to pay the same. By the Ohio division is meant that part of said railroad property situated in said State of Ohio.

"But this defendant expressly reserves the right to enforce his said decree in said State court by the usual process of sale as upon execution, as directed by said decree, and does not in any manner waive any right which said decree gives him."

This was the issue which was reserved to be tried in the decree of sale as to Compton. There is absolutely no foundation for any statement that he intervened, that he filed any cross-bill, or that he made or interpleaded the Indiana bondholders or any one else. He set up his decree, attached an exemplified transcript of the record of his suit, and asked for its protection "*in any such order or decree as may be rendered herein.*"

That issue, by the concurrent judgment of every court which has had it, has been decided in Compton's favor.

2.

A great deal of stress is laid in the briefs of opposing counsel upon the fact that Compton owned only one-quarter of the issue of equipment bonds and that the other bond-

holders are not in court and were not parties to our Ohio suit. Mr. Crawford's second point, commencing on page 16 of his brief, is devoted wholly to this.

In the first place, that question is not before this Court and was never in this case. Compton was not made a party to this suit because he held equipment bonds, *but because he held a decree of a court of competent jurisdiction, declaring that he had a lien for a specific amount, and decreeing that unless that amount be paid certain property be sold to pay it.* He was made a party hereto because of that decree, and the only attack made on him as the holder of that decree was that the decree was barred by the decree in another suit. In the Federal Court the holders of equipment bonds who have no decree can have no lien, because of the ruling in the Ham case, and hence the counsel conducting this suit did not make them parties. We are in no way responsible for the making or omission of parties to this suit.

There is no decree in the Ohio State court except "that the defendants or any of them pay to the plaintiff (Compton) the said sum of $339,820.42, *now due on said bonds owned by the plaintiff,* within ten days from the entry of this decree, and in default thereof," &c.

That decree would have been entirely satisfied if the defendants had paid that amount to Compton. Every person interested in the Ohio railroad, except the owners of the first two mortgages, one for $900,000 and one for $1,000,000, on the Ohio property, is bound by it.

It was the only decree possible under the issues in the Compton case. He set up the ownership of his own bonds by their numbers; he asked for no relief except on his own bonds. The Ohio courts were invested with jurisdiction to determine whether they had the necessary parties before them. The defendants in the Ohio case had a right, if they saw fit, to raise the question whether the suit ought to be a representative suit or whether other parties should be brought in. They did not do so. If they did and the

Ohio court decided to proceed without any additional parties, *the determination by that court was final.* It had jurisdiction to determine that and all other questions between the parties.

In section 5062 of the Revised Statutes of Ohio it is provided that a defendant may demur to the petition when it appears, * * * "5, that there is a defect of parties plaintiff or defendant." By section 5064 it is provided that "whenever any of the defects enumerated in section 5062 do not appear upon the face of the petition the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

Hoop *vs.* Plummer, 14 O. S., 448.
Cairnes *vs.* Knight, 17 O. S., 68.

This objection, if it was in any event available, was not made, or, if made, the court which had jurisdiction to decide it, overruled it, and decree was entered in favor of Compton on his individual bonds. As a matter of fact, it was not made.

We need no other authority than the Compton case, 45 O. S., 592, to establish that in Ohio this suit was properly brought, and all of the parties to it are bound by it.

Nowhere in the Compton record and nowhere in the record in this case does it appear that any party to either suit ever made any question about the other equipment bondholders, and it is only in the briefs of counsel from which either the circuit court of appeals or this Court can learn that there are any others. They are nowhere referred to in the opinion of Judge Jackson or in any pleading or paper filed in the case.

Their situation, therefore, does not become a question in this case. Compton's decree directs the payment *to him* of

$339,820.40, the amount due on the bonds owned *by him*, the numbers of which he correctly gave in his petition. For aught that appears in this record, every other equipment bond that was ever issued has been paid, or is barred by the decree in the Ham case or by failure to assert any claim on it.

We suggest that if any other equipment bondholder felt that he was entitled to any part of our recovery, he would be the proper party to make it known.

We desire to emphasize the fact that we are not claiming any lien in this case as owners of any equipment bonds, but as the owner of a decree of a court of competent jurisdiction of last resort, declaring that Compton has a lien for a specific amount of money, for which, if not paid, certain property shall be sold. The authorities cited on pages 19 to 22 are therefore inapplicable.

In addition, the very decree of sale under which this purchase was made directs the payment to Compton by the purchaser of the specific amount of his decree, if it is in force. That, we submit, is a conclusive fact on this point.

3.

The first point made by Mr. Crawford, being pages 6 to 16 of his brief, it seems to us, needs no other answer than to remind the Court that the purchaser under the decree of sale and all claiming under him get no rights other than the decree of sale gave them.

There is no question here of annulling "a title and new interests arising under a confirmed foreclosure sale," nor of "a purchase of several years' standing, and necessarily new rights of great magnitude," nor of "belated and disturbing redemption to other mortgagees, purchasers, intervening equities, and public interests."

These parties purchased and obtained all their interests under a decree of sale which found the amount of our de-

cree, which provided that if that decree was in full force the purchaser should pay us that amount and interest within ten days from the adjudication that the decree was in force, and that in default the court would take the property back and resell it, or otherwise enforce such payment by the purchaser.

The appellee therefore holds under what Mr. Crawford is pleased to call a "confirmed purchase," but subject always to that condition and that liability, which is a limitation on his title and purchase. Every person who has received bonds from the company took them with that condition and limitation in the very muniments of its title. No person has acquired interests or rights which are not expressly subject to this provision of the decree, which we may fairly assume was duly provided for by setting aside bonds or otherwise.

He says Compton "made no actual tender of the amount due under the senior Ohio mortgages," and, "after the lapse of eight years, he has no present equity to cloud it or annul the title." This is extraordinary reasoning.

On the 24th day of March, 1889, our demurrers were overruled and leave given us to answer by April 5, 1889. On the same day that our demurrers were overruled they took their decree of sale, viz., March 24, 1889, in which is found the reservation in Compton's favor. Four days later we filed our answer. Jesup and Knox filed their replication to our answer May 7, 1889. The case was referred to a master, tried before the master, who found that our decree was in full force, and that we were entitled to payment from the purchaser or a resale of the property. Exceptions were filed to this report and were heard before Judge Jackson, and from that day to this there has been a persistent fight against paying us.

We assert that the requirement of redemption was never suggested in any form until it appeared in Judge Jackson's opinion. It is not found in any form in the report

of the master, in the exceptions to his report, in any brief or argument, or in any other place, until it appeared in the opinion filed by Judge Jackson January 12, 1892, and the decree thereon entered July 12, 1892. From that decree we appealed in due time to the circuit court of appeals, and there argued our case when it was reached, and the case is now here by the action of that court.

What importance has the "lapse of eight years" under these circumstances? Would any one suppose, under the provisions of the decree of sale made with reference to our decree, that we were bound to redeem from anything? Counsel and the court below have treated us as if we were not in the case, but were now filing an independent bill to redeem; and, worse than that, because, if that was our attitude, we would have the right to redeem from the Ohio mortgages alone, because they alone rested upon the property which our decree gave us the right to subject.

We have filed no bill to redeem; so that under no circumstances could the rule or the authorities invoked apply to us. When the court reached the conclusion that we must redeem, it required us to redeem from the Indiana as well as the Ohio mortgages and rendered a decree against us to that effect, and our only remedy was to appeal from it.

In the whole discussion counsel remain blind to these important facts. We are not filing a bill to redeem. We are in this case, *in invitum*, alleged by the parties who brought us in to have a lien by virtue of our decree, which they set up and which they assert is barred. Prior to the determination of that issue, however, they want a sale—that is, without waiting until our rights are determined. Without any reservation whatever as to our lien, we would have had the right to bid on the Ohio division a price high enough to produce a fund sufficient for our payment. The money, after paying the two first mortgages, would belong to us until we were paid; but under this decree the purchaser was to pay us. *He was to stand, as to us, in the place of a sufficient fund*

from the sale to pay us our lien in full. As there was a purchasing committee representing all liens but Compton's, the parties might well agree to this because none of them, save the first and second mortgagees, could possibly get any part of the proceeds of sale until Compton should be paid in full if his lien could not be defeated on the issues to be made thereon. What has redemption to do with all this? We are in the case as a party defendant and no rule required of us a tender of the amount of the mortgages. Counsel, in the entire statement on pages 13 to 16 as to the facts in the case, labor under an unaccountable misapprehension. It is impossible to take up each statement separately or to answer each assertion without making this brief too long.

Right here we may as well notice the complaint on page 15 about our insisting that we were not obliged to redeem, while the question certified is only whether we have the right to redeem from the Ohio mortgages alone.

We say, 1st, that this Court has the right, if it choose, to order up the whole record and render such judgment as ought to have been rendered below, or, by its mandate, direct the courts below so to do; 2nd, if the Court should be of opinion that we were entitled to more than the affirmative answer to the question certified, it would be a sufficient reason for, at least, giving us that affirmative answer.

4.

Objections to separate sale or redemption are urged on the grounds of the "disastrous consequences that would arise therefrom" (brief, page 9). Result to whom? Every person who became in any manner interested in this property since the first mortgage to the Farmers' Loan and Trust Company did so with knowledge that in any foreclosure that separation was liable to take place. It did take place in 1858, when the Ohio and Indiana divisions were sold separately subject to the first mortgages on each division.

It took place when these very parties separated the system at the Mississippi river; also when they separated the Michigan division. It took place in 1882, when, in Compton's suit, the decree of the Ohio court of common pleas ordered the sale of the Ohio property to pay the amount due Compton. It took place in 1888, when the supreme court of Ohio made the same decree. It took place in the very decree of sale under which this appellee purchased.

By the terms of this decree the amounts of the several divisional mortgages were found, and in each case that the same constituted a lien *on the property mentioned and described in said mortgage.* These several amounts are ordered paid in ten days, or in each case "the equity of redemption, *in the property mentioned and described in said mortgage,* be foreclosed and forever barred." (See 24th paragraph of decree and succeeding paragraphs.)

It is ordered and decreed "that in default of the several payments hereinbefore directed to be made, or any of them, the *property mentioned and described in the mortgage or mortgages,* respectively, as to which such default shall be made shall be sold," &c. (36th paragraph of the decree.)

"The said mortgaged property shall first be offered for sale separately, as described in each of the hereinbefore-mentioned divisional mortgages," &c. The master shall accept no bid for the Ohio division less than the full amount of the first and second mortgages thereon, including amounts apportioned thereto for scrip certificates and funded debt bonds. Provisions as to upset price were made as to the other divisions.

Then, after the property was thus separately offered, it was to be offered together, and if an entire bid was received greater than the aggregate of the several bids it was to be sold as an entirety, subject to the power of the court to reject any bids and to retain and resell the property as herein reserved and provided. In case of a unit sale the amounts of the several bids were to be returned as a basis for distribution to the

several divisions of the amount of the proceeds to which they would be entitled. (Paragraph 36.)

From this decree the following results were provided for: 1st, payment by the railroad company of the amount of any one of the divisional mortgages and allowing the sale of any other division; 2d, the sale of any one division for which there might be bidders; 3d, the sale of each of the divisions to separate and distinct purchasers; 4th, the sale of the property as a unit only in the event that at the sale some one would bid more for the entire property than the aggregate of the several bids, in which event the amount of the bid on any one division determined the proportion of the aggregate bid which that division was to receive on distribution.

None of the calamities which counsel now anticipate from executing this decree were in their minds when they prepared the decree and had it entered.

It was the right of the lienholders on the several divisions to have the property upon which their lien rested sold separately. No court would deprive them of that right without their consent or without making ample provision for their protection.

5.

There is another feature about this decree which counsel seem to overlook. *Each one of the Indiana mortgages is found to be a lien upon the Indiana property only. Each one of the Ohio mortgages is found to be a lien upon the Ohio property only.* The amount of the Indiana mortgages is found and the defendants ordered in ten days to pay that amount or the equity of redemption in that property will be foreclosed and the property sold. The amount of the Ohio mortgages is found and the defendants ordered in ten days to pay that amount or the equity of redemption in that property will be foreclosed and the property sold.

There is nowhere in the record of this case, in the pleadings or the decree, a claim or a suggestion that the Indiana mortgage bonds were in any way a lien on the Ohio property, or the Ohio mortgage bonds a lien on the Indiana property.

Any of the defendants interested in the equity of redemption might have paid off all of the divisional mortgages, excepting the Indiana mortgages, thus leaving the Indiana property alone to be sold for their benefit.

The exact amount, nature, and extent of the lien of each of the divisional mortgages is found and determined by the decree and the property upon which the lien rests.

The purchaser under this decree cannot enlarge the lien as thus found. If the decree had declared any one of the mortgages invalid, in whole or in part, that issue being presented, the purchaser could not re-assert its validity against any one entitled to payment or redemption.

The decree fixes the time for payment; it is full and final as to the rights of the lienholders, as to amount, the priority, and the property, as between all the parties to the suit, and the purchaser can claim no greater right than is determined by the decree as to each of these mortgages or the mortgage bonds, if, indeed, as against Compton, he can claim subrogation at all.

6.

It is urged in the third proposition (page 26) of the brief of Mr. Crawford, that Compton's petition in the State court asserted no right or propriety of severance, but that it pleaded a single lien upon a single debtor road, subject to four mortgages which were specifically described. That is also asserted in the original brief of appellee, on page 6, where a quotation from the prayer of Compton's petition is given.

That fact simply emphasizes the action of the Ohio courts

in the severance of the Ohio property and subjecting it alone to sale in case of non-payment. Notwithstanding that prayer, the court in 1882 refused to grant him more than the sale of the Ohio property. He was content, but the defendants to his suit appealed. Then the supreme court, notwithstanding his prayer, again granted only the sale of the Ohio property.

The objections to the severance of property urged by counsel on pages 36 *et seq.* of the brief might have been proper for consideration by the Ohio court when considering Compton's suit. Whether the rules contended for by counsel would apply to properties in different States, so as to bind the courts of one State in enforcing the lien or debt against the property within its jurisdiction, we think we need not inquire here. Certainly it is a principle well established that when a court of competent jurisdiction has determined by decree that the creditor or lienholder *may* enforce his entire lien against *one* portion of the property bound for its payment, that such decree is conclusive, whatever the rule may be in the opinion of other courts.

The chancellor who had the right to determine this question has determined it, and in a suit which binds everybody who has any right to be heard upon it, and there remains no undetermined question of equitable contribution for any other chancellor to deal with.

One of the curious things, as it seems to us, about the position of counsel for appellees is that they are seeking to re-argue both of these cases—Compton's case in Ohio and this foreclosure suit—just as if no decrees had ever been entered in either.

We think that in the sixteen years of litigation we have made some progress, and that all that has been determined or should have been determined in those suits is definitely and conclusively settled by the decrees rendered therein, which remain in force and unappealed from. No appeal has been taken from the decree of sale in this case,

in which the full measure of relief to which each mortgagee is entitled is determined.

There is, therefore, no open question here as to several parcels of land being charged with a common debt, and no facts upon which the principle of the consolidation of securities, as it is called in the brief, can be invoked.

Some authorities relied upon by counsel on pages 38 to 42 are wholly inapplicable to any question or to the question which they claim to sustain.

P. C. & St. L. R. R. *vs.* Central Ohio Railroad Co., 38 O. S., 614, decides, as shown by the syllabus, which in Ohio is the decision of the court, that—

"A railroad corporation having purchased from another railroad company an undivided interest in the latter's railroad, under the act of April 7, 1863, in relation to insolvent railroad companies, &c., which authorizes such sale under certain conditions if the same can be made without impairing the usefulness of the road to the vendor company, whereby a tenancy in common was created between the parties, cannot compel partition of the common property, either under the statute in relation to partition or in equity."

The statute which authorized the sale of an undivided interest in a railroad from one company to another is recited by the Court on page 626 of the report. After such sale of an undivided interest there was no power in either or both of the owners to sell the property or any part of it, and the Court held that the purposes of the statute and the deeds made under it would be defeated by an involuntary partition, and hence the case was not within the partition statute or the rules of equitable partition. The quotation from the opinion was the reasoning of the judge as to why, in interpreting these statutes, the case at bar should be held to be excluded.

How can that apply to any question here?

The most remarkable reference in the brief is to the case of Stewart, adm'r, *vs.* W. & L. E. R. R. Co., 53 O. S., 152, and

the proposition on page 55 of the brief that, under that authority, Compton became a judgment creditor *pendente lite*, because his decree was finally rendered by the Supreme Court in 1888, while the Federal court had the possession of the property, by its receiver, since 1884.

The Court will remember that our suit was a suit *quasi in rem*, commenced in 1880, when, by the issue and service of summons under the Ohio statute and the general rules of chancery without statute, *lis pendens* was established. Any decree entered in the case related back to and bound the property and the parties and all persons claiming under them from that date. In *1882* Compton had a decree in the common pleas court, afterwards suspended by the appeal, but binding until final decree, and the decree of the Supreme Court therefore relates back to 1880. It was not until *1884* that the so-called insolvency bills were filed by the Wabash, St. Louis and Pacific Railway Company, and not until *1887* that this suit was instituted.

We are not in the situation of the parties in the Stewart case, who, on unsecured claims, obtained judgments at law against the railroad company while the foreclosure suit was pending.

The case of Stewart against The Wheeling and Lake Erie Railroad Company, above cited, reasserts the doctrine long established in both Ohio and Indiana:

"But a judgment recovered in a State court against the railroad company prior to the commencement of the foreclosure suit by a creditor who was not made a party remains unaffected by the decree and sale. Such judgment becomes a lien upon the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots, and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale." (Page 152.)

"Any such encumbrancer, *whether prior or subsequent to the mortgage*, who has not been made a party, may maintain

an action to enforce his lien and have a resale of the property for that purpose, * * * but he is not required, as a condition of his right of resale, to first pay such prior encumbrance." (Pages 167, 168.)

Citing—

Frische *vs.* Kramer, 16 Ohio, 126, 139.
Myers *vs.* Hewitt, 16 Ohio, 449.
Childs *vs.* Childs, 10 O. S., 339.
Stewart *vs.* Johnson, 30 O. S., 24.
Holliger *vs.* Bates, 43 O. S., 437.

This has been the rule in Ohio for seventy-five years, fixed by statute and a rule of property.

It is and always has been the rule in Indiana.

Horsford *vs.* Johnson, 74 Indiana, 479, and cases cited in the opinion.
Catterlin *vs.* Armstrong, 79 Indiana, 514.

The above case from 53d Ohio State very effectually disposes of the contention in the first brief of Appellees' Counsel, pages 43 to 48, that Stewart *vs.* Johnson, 30 O. S., 24, and the Ohio statute did not relate to railroad property and was confined to mortgage liens.

There it is applied to the lien of a judgment at law and to railroad property specifically.

We have the right to consider this rule in connection with the reservation in the decree.

This rule, it is fair to assume, was known to and was in the mind of the court when it made the reservation in the decree of sale in Compton's favor. The position was this: Compton had a decree of sale of certain property for the payment of an amount found due him. That decree entitled him to sell that property subject to two prior liens. In the Federal court it was said that that decree was barred. The court was called upon to order a sale before that question was determined; and, as his remedy not only by the law

of Ohio and Indiana, but by Compton's decree itself, gave Compton the right *to sell*, so the court *said to all the parties to this suit*, whether claiming liens prior or subsequent to Compton's: "We ascertain and determine the amount due Compton on his decree, if it is not barred, viz., $339,930.40, and we will after the sale try the question whether the decree is barred, as alleged, and if we find that it is not, *considering the terms of the decree itself, and that it is made in accordance with the settled rule of law in both Ohio and Indiana, where the property is situated, and which does not require redemption as a condition precedent to a sale*, we will require the purchaser to pay him the amount thus found due him or we will take the property back from the purchaser and sell it or otherwise enforce that payment."

In other words, having every lienholder before the court, and every lienholder except Compton desiring a speedy sale, in advance of the determination of Compton's rights, and all *other* lienholders being protected by the decree, so that they might bid on the property and use their claims, so far as applicable, to the payment of their bid, and Compton alone not being thus protected, he was relieved from any necessity of protecting himself at the sale, and the duty of paying him was imposed upon the purchaser if the court should find that his decree was not barred. This determination was emphasized by making it the duty of the purchaser to pay him within *ten days* from the date it should be determined that his decree was not barred.

The short time that we thus fixed was ample notice to the purchaser that it was intended to leave no question to be litigated after it was determined that his decree was not barred, as also the provision that in default of such payment *the court should resume possession of the property, &c.* That means, in view of the situation and purposes of the decree, to save Compton from any necessity of protecting himself at the sale, that the Court will take the possession of the property in the event that the purchaser does not pay

him within ten days and will, by resale or otherwise, enforce such payment. The Court might, instead of reselling the property, sequester sufficient of the earnings and income of the property to pay the amount due Compton, or by other means enforce its payment.

We think that to give this reservation such construction as will afford the least protection to Compton is a violation of the intention of the court, manifest at the time, to afford him the greatest protection.

The clause of the reservation providing for the enforcing of his decree by resale or *otherwise*, as the Court may direct, does not mean that the Court will do "otherwise" than require payment of the amount due him. It was intended to leave open to the court all means of requiring payment by the purchaser. After inserting this provision and providing for the trial of Compton's issues the decree then goes on to make further limitations and reservations of very strong character to prevent the purchaser from obtaining by virtue of this decree of sale or the purchase under it any new weapon of defense or claim as against any of the parties to the suit. There is certainly nothing in the language used that qualifies in any degree the Court's order that if Compton's lien was not barred the purchaser should pay him.

The sale which was to take place would effectually foreclose the mortgages, the trustees of which had presented the issues as to Compton's lien. By that sale they would have received their money or be otherwise foreclosed and out of the case. They would no longer be interested in any issue as to Compton. They would no longer have any right to be heard as to Compton's lien. The issue as to Compton was to be tried after the sale, and it was to preserve the status as to the issue of Compton's lien being barred, presented by the mortgagees who did present it, that the second clause of the reservation was inserted, as well as to prevent the construction that the purchaser acquired any

other status to contest Compton's decree than that of the mortgagees. "To preserve the rights of said Compton in the relation in which he now stands" towards said mortgagees can have no other meaning and was not intended to have any other.

We may as well here answer another error everywhere apparent in the appellee's brief. There is no setting aside here of the sale made and no reinstatement of the foreclosure suit made necessary by enforcing this provision. It is not out of the proceeds of the sale only that Compton is to be paid. If it was, he could have gone to the sale, and by bidding up the Ohio division to enough to pay him have got his pay, even though the property sold as an entirety, because the proportion of the aggregate bid represented by the separate bid would have been distributed to the Ohio lienholders, including Compton. To use the language of this Court in a similar case, it is because "the rights of the Paris and Decatur bondholders are sufficiently secured, and that they have substantially the benefit of a separate sale. No one of all the parties can get less by the sale in gross." (Union Trust Company *vs.* Illinois Midland, 117 U. S., 434.)

It is the purchaser who is to pay him, and it is the purchaser's property which will be resold if he does not pay him. There is no setting aside of the sale, no setting aside of the confirmation, no redistribution of the fund, no reinstatement of the foreclosure suit; it is simply the court enforcing the terms of purchase against the purchaser.

6.

For the purposes of this case, it is immaterial whether the rule is correctly stated or not, that a lienholder on a part of a railroad, in enforcing his lien, may be denied a sale of the particular part of the road on which his lien exists, out of considerations of public policy, or whether, as counsel put it, "The peculiar nature of railway property and the public

duties with which it is charged forbid any unnecessary or injurious severance thereof," is a correct proposition or not.

If the lienholder has a first lien on any part of it or a superior lien to the liens on the entire line, whether the road be sold as an entirety or the particular part be sold, his first or superior lien will in some form be protected.

In the Dayton, Xenia & Belpre Railroad Company *vs.* Lewton, 20 O. S., 401, the supreme court of Ohio required the sale of the railroad to pay a lien on a particular piece of the right of way, because selling "the section of the right of way, and separate its use from the line of the road, would destroy the highway." But from the proceeds of the sale of the entire railway Lewton was to be *first paid*, and that is the rule of the Indiana case and all the other cases cited. Cutting out a section of a railroad is very different, however, from selling a division of a railroad built and operated under a charter and franchise and subject to liens, where it afterwards became a part of a larger system by consolidation.

So in Smith Bridge Company *vs.* Bowman, 41 O. S., 37, where mechanics' liens were established on bridges built as part of a railroad, the whole road was ordered sold, but the lienholder was paid out of the proceeds. The owners can stop the sale by paying, as was done in each of those cases.

But the argument which counsel make in this regard is just as applicable to the division at the Illinois line as at the Indiana line. They seem to be perfectly willing to break the railroad at the former place, because to require us to redeem from the Indiana mortgages is equivalent to denying us any relief; but they are shocked at the idea of breaking it at the latter place. All that counsel say under this head would prevent any sale that did not include the entire line in Ohio, Indiana, Illinois, and Missouri, and yet none of the counsel and none of the judges found any difficulty in splitting the railroad at the Indiana line, which is as much subject

to this objection as at the Ohio line. Could we be required to redeem from the mortgages on the entire system? If Morgan, trustee under the second Ohio mortgage for $1,000,000, was left in Compton's position by this decree, would he have to redeem from the whole list of mortgages on the entire line in order to obtain a sale of that part included in and covered by his mortgage? And yet, if the argument is good at all, that would follow.

But we say that all this is now outside of the case. These considerations should have been urged before these decrees of sale ordered the separate sales, and it is useless to pursue this further. No light would thereby be thrown on the question of our duty to redeem *in this case* and, if such duty exists, whether we may redeem from the Ohio mortgages. Furthermore, Compton's decree has a conclusive adjudication severing the Ohio property for purposes of a sale to satisfy Compton's claim.

7.

We think we have sufficiently answered the sixth proposition of the brief referred to in our main brief, pages 26 *et seq.*, except that it is difficult to be patient under some of the statements made in this and other parts of the brief. Where, for instance, does the supreme court of Ohio *adjudge* our interest in the fund to be realized from the sale ordered, if Compton be not paid, to be *one-quarter?* Where does counsel get justification for the assertion, on page 53, that "he (Compton) in effect abandoned it and came into the Federal court, not to obtain the same relief adjudged to him, but substantially variant," &c., or that we "were asking equity to piece out and give effect to a defective decree"? Like the statements so frequently made that "Compton intervened," "that he filed his answer as a cross-bill," "that he interpleaded new parties," and the like, these statements are not sustained by the record.

Our decree in the supreme court of Ohio was rendered in May, 1888. In due course of time the mandate went down to the court of original jurisdiction. That decree found the amount due Compton, ordered the payment to him of that amount, and in default that the property be sold and the proceeds brought into court for distribution, which is the course taken in every decree in Ohio. Before distribution the sale must be confirmed and an order of distribution made. The sheriff does not distribute money under chancery decrees in Ohio. There is not a word in the Ohio decree that even intimates that there was at the time it was rendered a single equipment bond outstanding except those owned by Compton. It finds that the bonds were issued and on the consummation of the consolidation became a lien, but nowhere is there or could there be any finding that any others of the bonds were unpaid or outstanding at the time of the decree. The Court can scan the record of that case and the record in this case without finding a word or sentence from which it can ascertain that there is or was during the period covered by such records another outstanding, unpaid, or enforceable equipment bond.

The suggestion in this and the former brief (page 7), that the property was appraised under our Ohio decree, "but no further steps were taken by Compton to bring the property to sale," is simply stating only a part of the fact. The supreme court decided our case in May, 1888. In October, 1888, we were made parties and served in this case. In November we moved to set aside the service, followed by demurrer, and in March the decree was entered with the reservations in our favor.

After being thus brought into this case and being thus situated in the decree of sale, it would have been absurd to proceed under our State decree by the processes from the State court. As we were in the case, it would have been a work of supererogation to proceed with the enforcement of the decree, as the situation of Compton under his decree and a

purchase under his decree would, in the particulars involved here, be precisely the same. (See Taft, J., Certificate, p. 35.)

8.

SOME CORRECTIONS.

The statement of the nature, purposes, and prayer of Compton's answer, found on pages 13, 14, and 15 of the brief, are purely imaginary. We have already shown what our answer was, and that the question of redemption appeared nowhere in the record. Were it not for the allegation that our decree was barred by the Ham suit, we would have taken our place in the decree as the third lienholder on the Ohio division, entitled to payment after the two prior mortgages, without question.

Counsel have assumed in both briefs that the purchaser is now the owner of the bonds secured by all of the mortgages in Ohio and Indiana (page 34, last brief), and that at present, by virtue of its purchase at the foreclosure sale, the Wabash Railroad Company holds as a single lien the entire four mortgages in the two States (page 38, first brief). There is not the slightest foundation for either claim. 1st. The purchaser does not own, by virtue of his purchase at the foreclosure sale, a single bond of either issue. To the extent of the purchase price applied upon them these bonds are paid; to the extent that they remain unpaid, they remain the property of the original holders, so far as the foreclosure sale is concerned. For certain purposes and to the extent of the payment, the purchaser may be subrogated to the lien on the property purchased for his protection; but he is not the owner of the bonds. He could not sue at law upon them or enforce the stockholders' liability, or any other liability which the bondholder or owner may enforce. 2nd. The process by which these four mortgages became a unit, as against lienholders on one of the divisions, is unknown to us.

Let us suppose that, instead of having a decree of the court establishing the amount of Compton's lien and his right to enforce it against the Ohio property, the owner of the property had made us a mortgage on the Ohio property next in point of priority to the two mortgages on the Ohio division, and he was now seeking to redeem that property from those two mortgages, would the Court treat this purchaser as the owner of a single lien in the aggregate of the four mortgages on different divisions, as a lien on the Ohio property, and compel us to pay the amount of all of them?

Compton's decree cannot be held to be of less dignity than such a mortgage would be. Counsel seem to place some weight on the fact that Judge Taft *infers* from the schedule of bonds deposited after the sale a large number of bonds of every class that the purchaser was enabled thereby to bid large amounts and protect their interest; but, even if this were shown by the record, it would not give the purchaser at the foreclosure sale as such any additional rights.

It is asserted in both briefs that we filed the same answer, and the same proceedings were had in Ohio and Indiana. That cannot be so. We had no decree for the sale of the Indiana property, and could have alleged none. We could not have asked in Indiana for the sale of the Ohio property alone; but this point is sufficiently answered in our former briefs.

Much is said in the brief about the affirmative relief asked by Compton, and it is repeatedly referred to in the opinion of Judge Lurton.

We were brought into the court below by summary process. The court had decided that it could force us into this suit to defend our rights. *We asserted no right except our decree in the State court.* That was all. We set up that decree and asked the court to protect the lien of that decree upon such of the property in the court's possession as it was entitled to.

Under these circumstances it is unfair to say of Compton

"his status was that of one applying to a court of equity for relief upon the footing of a former decree, which by circumstances subsequently ensuing could not be advantageously enforced without further aid."

It is true in our answer we claimed that our decree which fixed our lien upon the property as of a certain date gave us a first lien on property which existed at that date, but was not covered by the prior Ohio mortgages, and that we also claimed that the decree was a lien on certain rolling stock; but these matters are not in the controversy now; all that is under consideration now is the property ordered to be sold by Compton's decree, subject to the prior mortgages.

We did not ask in our answer that our decree be changed by adding to it or detracting from it in any particular. The case stands here exactly as if we had simply denied the allegation that our decree was barred.

We cannot assent to the statements in the original brief (pages 9 and 10), and also in the latter brief, as to the omnibus character of the litigation, although, in view of the decree entered upon the separate mortgages, we do not see how it is material, and this point is sufficiently covered by our previous briefs.

9.

The principle announced in the cases on pages 19 to 23 of the brief are in no sense adverse to our contention.

In Simmons *vs.* Taylor, 38 Federal Reporter, 682, the Court held:

1. That the present company in that case had succeeded to the redemption right of the *original mortgagor*, and is entitled to perfect the title to the property by paying off the amount due upon the income and equipment mortgages. It has therefore a direct interest in the question of the amount due on those mortgages, and is entitled to be heard

upon all objections that can be fairly made to the validity or amount of said bonds.

In this case at bar there are no objections that can be raised by the owners of the equity of redemption to the amount due Compton. The only question that could be raised—viz., Was his decree barred or in force?—was raised and tried and decided in his favor. He had a decree in his favor from a court of competent jurisdiction, which bound everybody entitled to redeem from these first and second mortgages; so that the purchaser, even if there were no provisions in the decree under which he purchased binding him, would, by reason of succeeding to the redemption right of the railroad company, have no defense to the Compton claim, because the owner of the equity of redemption was bound by the decree in Compton's favor; but, in addition to that, all of the mortgagees, prior as well as subsequent to the lien of Compton, and the purchaser also, were bound by the decree of sale in this case, which found the amount due Compton to be $339,930.40 and which adjudged that if his decree and the lien thereby created *continue in full force and effect*, then that amount should be paid to him.

This determination by the Court of the amount due him precludes everybody, including the prior mortgagees and the purchaser, whether as purchaser from the owner or successor to the prior mortgagees. So that, by reason of the fact that every one interested in the equity of redemption from the two prior mortgages are bound by Compton's decree, and hence no right of defense exists to which the purchaser can be subrogated, and by the fact that the decree in this case, under which the purchaser bought, determines the amount due Compton, and also that his decree and lien are not barred, but are in full force, the purchaser is precluded from the rule announced in the cases referred to.

2. There was no decree in Simmons *vs.* Taylor in favor of the bondholders or upon the bonds sought to be enforced

there. The defendant railroad company in that case had open to it every defense of validity and amount due as against these bonds, and the Court very properly said :

"Whatever bonds were then valid claims under the income and equipment mortgage had reserved to them the right of redemption—that is to say, being then claims enforceable under the income mortgage, the lien of that mortgage protected them. That mortgage, however, was a lien only to the amount of the bonds then valid and enforceable thereunder, and when the present company took the title to the property under the foreclosure sale it was subject to a right of redemption in favor *only* of such bonds as were then, through the income mortgage, liens upon the property."

But how does that apply to us? The amount due us and the validity of our lien has been determined by a decree which binds every person interested in the equity of redemption. As against us no one behind the first two mortgages can make any question. As to the first two mortgages, they are only entitled, as against the owners of the equity of redemption, to payment of the amount due them. We are prior in right to any one else in the equity of redemption. We have succeeded all other parties in any right to redeem to as great an extent certainly as if he had purchased from all others interested the property subject to these two prior mortgages. The purchasers succeeding to the rights of the owners of the equity of redemption *do so subject to our prior right*; and when they stand on the rights of the mortgagors they are met with our prior right. The parties to whose rights they thus succeed are foreclosed from any defense against our lien.

Besides, as already shown, there can be no succession to the rights of any one here, because the very decree under which the purchaser bought has determined the amount due us, if the decree and the lien established by it are in full force, and that question has been determined in our favor by the unanimous decision of all the courts below.

10.

The statement of counsel on pages 21 and 22 of their first brief that "as to the prior mortgagees in Ohio and Indiana, whose rights were all merged in the Wabash Railroad Company, the Compton decree was null and void, and as against Compton they could attack his right to redeem at all and invoke the rule announced by this Court in Wabash, St. Louis and Pacific Railway Company *vs.* Ham, 114 U. S., 587, that Compton *as the holder of equipment bonds* had no lien upon this property, is very easily answered.

In the entire argument by counsel there is an entire confusion of the rights of these senior mortgagees with the rights of the purchaser. As mortgagees, they have as against the mortgagor and those succeeding the mortgagor only the right to payment. When they are paid their interest in the property terminates. As to who has the right to pay them, it is sufficient to say that any one succeeding to the right of redemption originally existing in the mortgagor *and whose right is good as against the mortgagor* is good for all purposes of redemption. If the mortgagor sells the property his grantee can pay off the mortgage and the mortgagee will not be heard upon the question of the validity of the sale. Certainly if the grantee has a superior title to his grantor, that is sufficient.

If the mortgagor makes a subsequent mortgage, the subsequent mortgagee, succeeding to the right of the mortgagor to the extent of the mortgage, may pay off the senior mortgagee, and he will not be heard to dispute the validity of the mortgage, which is good as between the parties to it.

If ejectment be brought against the mortgagor and the plaintiff succeeds and has his title as against the mortgagor established by final judgment, binding the owner of the equity of redemption, such successor to the title can redeem, and the mortgagee will not be heard to dispute his

right to redeem, the mortgagee having only the right to payment.

Our right is established against every person entitled to redeem, to be superior to theirs. *We* are therefore subrogated to the rights of the mortgagor, *not the purchaser* at the foreclosure sale.

It is not true, either, that our decree is null and void as to the prior mortgagees or any one else. It may not bind the prior mortgagees, who were not parties, so as to preclude any defense which they have the right to make, but as our decree binds the parties to it, viz., every one interested in the equity of redemption, it precludes the prior mortgagees from disputing our right, as against the subsequent mortgagees and the mortgagor, to redeem from such prior mortgagees. In other words, the purchaser succeeding to the rights of the senior mortgagees is entitled only to payment; as successor to the mortgagor he is precluded, because the mortgagor is, from any defense to our lien. As such successor the purchaser can make no defense that the railroad company could not.

Our lien is *conclusively* established against every person subsequent in interest to the two older mortgages. The purchaser, succeeding to the rights of all such persons, is subject to that conclusive determination of our lien. Succeeding to the rights of the senior mortgagees, the purchaser is entitled only to payment, and he cannot dispute our right to make such payment.

Respectfully submitted.

JOHN H. DOYLE,
JOHN G. MILBURN,
JUDSON HARMON,
For Appellant.

DECEMBER, 1896.

IN THE MATTER OF

JOSEPH T. H. HALL, PETITIONER.

Application for leave to file Petition for Writ of Mandamus to the Judges of the Court of Claims.

EDWIN FORREST,
Attorney for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE MATTER OF JOSEPH T. H. HALL, PETITIONER.

And now comes the petitioner and applies to the Supreme Court of the United States for leave to file the petition, hereto accompanying as part hereof, for a writ of mandamus to compel the judges of the Court of Claims to follow and obey the mandate heretofore issued by the said Supreme Court in the cause pending before it, wherein The District of Columbia is appellant and Joseph T. H. Hall, the petitioner, is appellee, and known as No. 619 on the dockets of the October term, 1896, of the Supreme Court, and render judgment in favor of the petitioner in accordance therewith.

J. T. H. HALL, *Petitioner.*

EDWIN FORREST,
Attorney for Petitioner.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Joseph T. H. Hall respectfully showeth:

First. That he is a citizen of the United States, resident of the District of Columbia, and files this petition in his own right with respect to the matters and things hereinafter stated.

Second. That heretofore, to wit, on the 13th day of December, 1880, the petitioner, pursuant to the provisions of the act of Congress entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved June 16, 1880 (21 Stats., 284), filed a petition in the Court of Claims against the District of Columbia, a municipal corporation, alleging that for certain work done and materials furnished by him under contract with the said District there was due to him the sum of $5,950 and interest, and demanded judgment therefor; that such proceedings were had in the said Court upon the said petition that on June 1, 1885, the said Court gave judgment in favor of the petitioner for the sum of $1,088 as due and payable January 1, 1877.

Third. That thereafter and on, to wit, the 3d day of April, 1895, the petitioner, pursuant to the provisions of a certain act of Congress entitled "An act to amend an act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved June 16, 1880," approved February 13, 1895 (28 Stats., 664), filed in the said Court a motion for a new trial, and such proceedings were had thereon that

on the 22d day of June, 1896, the said Court of Claims caused judgment to be entered in favor of the claimant in the following words, viz:

"The Court, on due consideration of the premises, find for the claimant and do hereby adjudge and decree that said Joseph T. H. Hall do have and recover, in the manner provided by the acts of February 13, 1895, and June 16, 1880, the sum of eight thousand six hundred and sixty-four dollars and nineteen cents upon debts of the District of Columbia due and payable January 1, 1877, within the intent and meaning of said acts.

By the COURT."

Fourth. That thereafter and on the 3d day of September, 1896, the said District of Columbia, defendant in said cause in said Court of Claims, applied for and gave notice of appeal to the Supreme Court of the United States, and said appeal was, on October 1, 1896, allowed by the Chief Justice of the Court of Claims.

Fifth. That the said cause, wherein the petitioner was claimant and the said District of Columbia defendant in the said Court of Claims and known as No. 224 on the docket of the latter Court, was duly docketed in the Supreme Court of the United States by the said District of Columbia as appellant, and the petitioner as appellee as No. 619 on the docket of the October term, 1896, of the Supreme Court, and thereafter the said cause was duly submitted to the Court, pursuant to its rules of practice, on printed briefs by the attorneys for the respective parties.

Sixth. That thereafter and on February 15, 1897, the Supreme Court delivered its opinion in said cause, reversing the judgment of said Court of Claims, and on the 1st day of March, 1897, the mandate of the Supreme Court was issued in the words and figures following:

"UNITED STATES OF AMERICA, *ss*:

"The President of the United States of America to the honorable the judges of the Court of Claims, Greeting:

"Whereas lately, in the Court of Claims, before you or some of you, in a cause between Joseph T. H. Hall, claimant, and The District of Columbia, defendant, No. 224, wherein the judgment of said Court of Claims entered in said cause on the 22nd day of June, A. D. 1896, is in the following words, viz: 'The Court, on due consideration of the premises, find for the claimant, and do hereby adjudge and decree that said Joseph T. H. Hall do have and recover in the manner provided by the acts of February 13, 1895, and June 16, 1880, the sum of eight thousand six hundred and sixty-four dollars and nineteen cents upon debts of the District of Columbia due and payable January 1, 1877, within the intent and meaning of said act.

"'By the COURT.'

as by the inspection of the transcript of the record of the said Court of Claims' court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

"And whereas, in the present term of October, in the year of our Lord 1896 the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

"And it is further ordered that this cause be, and the same is hereby, remanded to said Court of Claims for further proceedings not inconsistent with the opinion of this Court.

"FEBRUARY 15, 1897.

"You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

"Witness the Honorable Melville W. Fuller, Chief Justice

of the United States, the first day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

"JAMES H. MCKENNEY,
"*Clerk of the Supreme Court of the United States.*"

Seventh. That thereafter and on the 2d day of March, 1897, the said mandate was delivered to and filed with the said Court of Claims, and on the opening of the Court on said day the petitioner, by his counsel of record, Edwin Forrest, called the attention of said Court to the said mandate and a copy of the opinion of the said Supreme Court (reported in advance sheets of opinions of Supreme Court furnished by the lawyers' edition thereof and printed in vol. 9, pp. 427–430) then and there in the possession of the said counsel, which opinion the Court then and there announced that it had seen, and moved the said Court for judgment, in accordance with the said mandate and the said opinion, for the sum theretofore found by them in favor of the petitioner, to wit, $8,664.19; and then and there the said petitioner, through his said counsel, expressly waived any interest whatever for and on account of the said judgment; and the said petitioner was present in open court at the time of such action on the part of his counsel, and the same was done with the knowledge and consent of this petitioner.

And this petitioner further says that at the time of the said motion on his behalf by his said counsel, the attorney representing the said District of Columbia was present in Court and openly stated to the said Court that he saw no reason why this petitioner should not have judgment in accordance with the said motion, and then and there gave his consent thereto.

And this petitioner further says that notwithstanding the premises the said Court of Claims then and there refused to grant the said motion, upon the express ground that there was then pending in the Congress of the United States legislation affecting claims filed under the acts of Congress here-

inbefore referred to and the jurisdiction of the said Court of Claims to further entertain the same.

Eighth. That thereafter and on March 15, 1897, the said Court of Claims made and entered upon its dockets an order in the words and figures following:

"DISTRICT OF COLUMBIA:

"In the Matter of Certain Cases against the District of Columbia.

"'The act 13 February, 1895 (28 Stats. at L., p. 664), having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments, and all other papers in such suits be restored to and retained upon the files of the Court without further proceedings being had.'"

And the petitioner says that among the certain cases against the District of Columbia referred to and described in the said order and embraced and included within its terms and provisions, was the cause of this petition herein referred to and described and in which the mandate was issued as aforesaid.

Ninth. The petitioner further says that the act of Congress referred to in the order, set forth at length in the eighth paragraph hereof, as repealing the act of February 13, 1895 (28 Stats., p. 664), is the act of Congress approved March 3, 1897, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1898, and for other purposes," wherein and whereby it is, among other things, enacted: "That the act approved February 13, 1895, entitled 'An act to amend an act entitled An act to provide for the settlement of all outstanding claims against the District of Columbia and conferring jurisdiction upon the Court of

Claims to hear the same, and for other purposes, approved June 16, 1880,' be, and the same is hereby, repealed, and all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid."

That, as appears by the date of the approval of said act, the same was enacted one day subsequent to the filing of said mandate in the Court of Claims and the said motion of the petitioner.

Tenth. That, as this petitioner is informed and believes, upon the filing of the mandate in said Court of Claims under the circumstances hereinbefore set forth, the said Court of Claims was in law and in duty bound to enter judgment, in accordance with the terms of said mandate and the said opinion of the Supreme Court, in favor of the claimant for the said sum of $8,664.19, and the said duty of entering up the said judgment was a ministerial one upon the said Court of Claims, and did not involve the exercise of any discretion whatever upon the part of the said Court.

Eleventh. The petitioner further says, as he is advised and believes, that inasmuch as the law provides no other adequate remedy in the premises, he is entitled to the writ of mandamus, and he therefore accordingly prays that he may be permitted to file this application for a writ of mandamus, and that thereupon a rule shall issue directed to the judges of the Court of Claims, requiring them by a day named to answer the exigency of this petition and show cause, if any they have, why a writ of mandamus should not issue by the Supreme Court commanding and directing the judges of the Court of Claims to render and cause to be entered judgment in favor of the petitioner and against the said District of Columbia for the sum of $8,664.19, as of March 2, 1897, the date of filing of the said mandate with said Court of Claims, in accordance with its terms and the opinion of this Court in the cause referred to.

And the petitioner further prays that upon the answer of the said respondents to this petition, this Court order a peremptory writ of mandamus to issue directing and compelling said judges of the Court of Claims to act and do as herein prayed.

J. T. H. HALL.

EDWIN FORREST,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Before me personally appeared the above-named petitioner, Joseph T. H. Hall, who, being first duly sworn according to law, deposes and says that he has read over the above petition by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true and the facts therein stated on information and belief he believes to be true.

J. T. H. HALL.

Subscribed and sworn to before me this 19th day of March, 1897.

A. E. L. LECKIE,
[SEAL.] *Notary Public, D. C.*

Claims to hear the same, and for other purposes, approved June 16, 1880,' be, and the same is hereby, repealed, and all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid."

That, as appears by the date of the approval of said act, the same was enacted one day subsequent to the filing of said mandate in the Court of Claims and the said motion of the petitioner.

Tenth. That, as this petitioner is informed and believes, upon the filing of the mandate in said Court of Claims under the circumstances hereinbefore set forth, the said Court of Claims was in law and in duty bound to enter judgment, in accordance with the terms of said mandate and the said opinion of the Supreme Court, in favor of the claimant for the said sum of $8,664.19, and the said duty of entering up the said judgment was a ministerial one upon the said Court of Claims, and did not involve the exercise of any discretion whatever upon the part of the said Court.

Eleventh. The petitioner further says, as he is advised and believes, that inasmuch as the law provides no other adequate remedy in the premises, he is entitled to the writ of mandamus, and he therefore accordingly prays that he may be permitted to file this application for a writ of mandamus, and that thereupon a rule shall issue directed to the judges of the Court of Claims, requiring them by a day named to answer the exigency of this petition and show cause, if any they have, why a writ of mandamus should not issue by the Supreme Court commanding and directing the judges of the Court of Claims to render and cause to be entered judgment in favor of the petitioner and against the said District of Columbia for the sum of $8,664.19, as of March 2, 1897, the date of filing of the said mandate with said Court of Claims, in accordance with its terms and the opinion of this Court in the cause referred to.

And the petitioner further prays that upon the answer of the said respondents to this petition, this Court order a peremptory writ of mandamus to issue directing and compelling said judges of the Court of Claims to act and do as herein prayed.

J. T. H. HALL.

EDWIN FORREST,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Before me personally appeared the above-named petitioner, Joseph T. H. Hall, who, being first duly sworn according to law, deposes and says that he has read over the above petition by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true and the facts therein stated on information and belief he believes to be true.

J. T. H. HALL.

Subscribed and sworn to before me this 19th day of March, 1897.

A. E. L. LECKIE,
[SEAL.] *Notary Public, D. C.*

167-38

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 17, ORIGINAL.

EX PARTE: IN RE JOSEPH T. H. HALL, PETITIONER.

Pursuant to the order of the Supreme Court, made on the 29th day of March, 1897, requiring that cause be shown by the judges of the Court of Claims, before said court, why a writ of mandamus should not be granted, as prayed in the petition of the above-named petitioner, the undersigned respectfully show and certify the following facts as to their procedure, and the reasons therefor:

That pending in the Court of Claims on and for long prior to said 29th day of March, 1897, were a large number of actions against the District of Columbia, originally brought under and by virtue of the act approved June 16, 1880 (21 Stat. L., 284); that in the course of the exercise of the jurisdiction under that act sums claimed had been either disallowed or withheld from many of the claimants by reason of the holding, approved by the Supreme Court of the United States, that certain high rates of compensation, known as "board rates," were not recoverable; that under and by virtue of the act of February 13, 1895 (28 Stat. L., 664), a new and additional jurisdiction, authority, and direction was conferred upon the Court of Claims, to allow the class of claims so disallowed as aforesaid; that in the performance of the authority and duty imposed on the Court of Claims by said act of February 13, 1895, many such cases were tried and judgments were rendered therein, adjudging, among other things, that the amounts included in said judgment became due at various dates prior to the rendition of the judgment, as an effect of which the judgment claimants became entitled to interest from the dates so ascertained and adjudged; that appeals from four of said judgments, including one in favor of Joseph T. H. Hall, mentioned and described in the petition, were taken to the Supreme Court of the United States, and that while there pending numerous other judgments were rendered containing the same form of adjudication as to interest, and that as to each of said latter judgments the District of Columbia filed motions for new trial, all of which were left pending until the decision of the questions raised by said appeals to the Supreme Court, which appeals were Nos. 617, 618, 619, and 620 in the Supreme Court; that on the 2nd day of March, 1897, that not being a motion day according to

the practice of said court, was presented in open court the mandate of the Supreme Court reversing the judgment in favor of Joseph T. H. Hall, which is described and set forth in the petition, together with a motion for entry of judgment for the sum of $8,664.19; that said motion was presented upon a day when the court was engaged in the regular trial of cases, and according to the practice of the court was received without argument and taken under advisement for decision thereafter; that at or about the same time the attention of the court was called to the pendency of the various motions for new trial from the numerous judgments, embodying the same characteristics which had been held to be erroneous by the Supreme Court, and on the said 2nd day of March, 1897, mandates from the Supreme Court reversing the three other judgments appealed from as aforesaid and heard together with that of Joseph T. H. Hall, and in the same form as the mandate set forth in the petition, were filed.

That on the said 2nd day of March, 1897, and before the court in the ordinary course of its business had been able to take up for consideration the motion for judgment in favor of said petitioner, or to examine the opinion of the Supreme Court, referred to in the mandate and set forth in the petition, the court adjourned to the 8th day of March, and while os adjourned, Congress enacted and the President approved the act of March 3, 1897, entitled "An act making appropriations to provide for the expenses of the District of Columbia for the fiscal year ending June 30, 1898, and for other purposes," which said act contained, amongst other things, the following provision:

"That the act approved February thirteenth, eighteen hundred and ninety-five, entitled 'An act to amend an act entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction upon the Court of Claims to hear the same, and for other purposes," approved June sixteenth, eighteen hundred and eighty,' be and the same is hereby repealed, and all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid."

That at the time of the passage of said act the judgment in favor of the petitioner, as also of said three other appellants, had been by the action of the Supreme Court reversed and set aside. The judges of the Court of Claims, upon conference and due consideration, reached the conclusion that said act of Congress had taken away the power of the court to render judgment or take any step or proceeding in the said case, or in any of the other cases pending or with reference to any of the judgments theretofore rendered under and by virtue of the jurisdiction conferred by said act of February 13, 1895; wherefore on the 15th day of March, 1897, that being the first motion day after the court resumed its sittings on the 8th of March, and the regular day upon which, according to the practice of the Court of Claims, judgments and decisions are rendered and entered, the said Court of Claims made the order set forth on page 7 of the petition in the following words, to wit:

"The act 13 February, 1895 (28 Stat. at L., p. 664), having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments,

and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had."

The undersigned, judges of the Court of Claims, therefore respectfully submit to the Supreme Court for its consideration, and for direction to them, the question of their duty under the apparent conflict, if any, between the mandate issued herein and the act of Congress of March 3, 1897, aforesaid.

And the foregoing is all the cause which the judges of the Court of Claims have to show why a mandamus should not issue in pursuance of said petition.

CHARLES C. NOTT,
Chief Justice.
LAWRENCE WELDON,
JOHN DAVIS,
STANTON J. PEELLE,
CHARLES B. HOWRY,
Judges.